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U.S. - DEPARTMENT OF JUSTICE
SPANISH TREATY CLAIMS COMMISSION

SPECIAL REPORT
OF
WILLIAM E. FULLER
ASSISTANT ATTORNEY-GENERAL

Being a Condensed Statement of the Work Done, the
Questions Considered, the Principles Laid Down,
and the Most Important Decisions made by the
Spanish Treaty Claims Commission from
the organization of the Commission,
April 8, 1901, to April 10, 1907



WASHINGTON
GOVERNMENT PRINTING OFFICE
1907

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STATUTORY PROVISIONS.

ORGANIC ACT CREATING THE COMMISSION.

(March 2, 1901. 31 Statutes, 877.)

[PUBLIC—No. 115.]

AN ACT To carry into effect the stipulations of article seven of the treaty between the United States and Spain concluded on the tenth day of December, eighteen hundred and ninety-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States shall appoint, by and with the advice and consent of the Senate, five suitable persons learned in the law, who shall constitute a commission, whose duty it shall be, and it shall have jurisdiction, to receive, examine, and adjudicate all claims of citizens of the United States against Spain, which the United States agreed to adjudicate and settle by the seventh article of the treaty concluded between the United States and Spain on the tenth day of December, anno Domini eighteen hundred and ninety-eight. It shall adjudicate said claims according to the merits of the several cases, the principles of equity, and of international law. One of said persons shall be designated by the terms of his appointment to be the president of said commission.

The President of the United States, by and with the advice and consent of the Senate, shall fill by appointment all vacancies which may occur in said commission.

SEC. 2. That each of the members of said commission, the Assistant Attorney-General, the assistant attorneys, and the clerk provided for by this Act shall be citizens of the United States, and shall take the oath of office prescribed by law to be taken by officers of the United States.

SEC. 3. That the said commission shall, within thirty days after the appointment of the members thereof, meet, and it shall thereafter hold its sessions, in the city of Washington. The Department of Justice shall provide said commission with all necessary and suitable rooms and offices for holding its sessions and transacting its business. All the expenses, including salaries and compensation of said commission and of its officers and employees, shall be paid by the Department of Justice, upon vouchers certified by the president of the commission or by order of the other members of the commission in case of his absence or inability to act; and the sum of fifty thousand dollars annually, or so much thereof as may be necessary, is hereby appropriated and made immediately available for the Department of Justice as a special fund for the payment of said expenses.

SEC. 4. That the commission is empowered to make all necessary or convenient and proper rules and regulations of practice and procedure for the transaction of its business.

SEC. 5. That the commission is empowered to appoint a clerk, and may also appoint one messenger and one or more stenographers, typewriters, and interpreters as the business of the commission may require; and may also appoint one or more commissioners, whose duty it shall be to take testimony in such cases as may be brought before said commission. Such commissioners to take testimony shall be citizens of the United States, and they shall receive for their services such fees as may be fixed by said commission, not exceeding the fees allowed by law for the taking of testimony to be used in the courts of the United States, including the sum of

three dollars per day which the courts of the United States are now authorized by section twenty-one of the Act of May twenty-eighth, eighteen hundred and ninety-six, to allow to commissioners.

The clerk of said commission shall, before assuming the duties of his office, execute a bond to the United States, with sufficient surety or sureties, in such amount and conditioned as the Attorney-General shall prescribe, for the faithful performance of his duties as such clerk.

The appointments authorized by this section shall be made without reference to the rules and regulations of the civil service.

SEC. 6. That the President shall appoint, by and with the advice and consent of the Senate, one additional Assistant Attorney-General of the United States, who shall hold his office during the existence of said commission, and the Attorney-General of the United States is empowered to employ such assistant attorneys as the business of the commission may require. It shall be the duty of said Assistant Attorney-General and assistant attorneys to appear as attorneys and counsel for the United States, under the direction of the Attorney-General, and defend the United States in all proceedings to adjudicate claims which may be had before said commission.

SEC. 7. That each of the said commissioners and the clerk and each of the commissioners to take testimony shall have authority to administer oaths in all proceedings before the Commission, and every person knowingly and willfully swearing or affirming falsely in any such proceedings shall be deemed guilty of perjury, and shall, upon conviction, suffer the punishment provided by the laws of the United States for that offense, when committed in its courts of justice.

SEC. 8. That all reports, records, proceedings, and other documents now on file or of record in the Department of State, or in any other Department, or certified copies thereof, relating to any claims prosecuted before the said Commission under this act shall be furnished to the Commission upon its order, made of its own motion or at the request of the claimant or of the attorney representing the United States before said Commission.

SEC. 9. That every claim prosecuted before said Commission shall be presented by petition, setting forth concisely and without unnecessary repetition the facts upon which such claim is based, together with an itemized schedule setting forth all damages claimed. Said petition shall also state the full name, the residence, and the citizenship of the claimant, and the amount of damages sought to be recovered, and shall pray judgment upon the facts and law. It shall be signed by the claimant or his attorney or legal representative, and be verified by the affidavit of the claimant, his agent, attorney, or legal representative. It shall be filed with the clerk of the Commission, and the prosecution of the claim shall be deemed to have been commenced at the date of such filing. All claims shall be filed as aforesaid within six months from the date of the first meeting of the Commission, and every claim not filed within such time shall be forever barred: *Provided*, That the commission may receive claims presented within six months after the termination of said period if the claimants shall establish to their satisfaction good reasons for not presenting the same earlier.

SEC. 10. That service of the petition shall be made upon the Attorney-General of United States at such time and in such manner as may be prescribed by the rules of said Commission. It shall be his duty to defend the interests of the United States, and he shall, within sixty days after the service of the petition upon him, unless the time shall be extended by order of the commission, file a demurrer or answer to said petition, which answer shall set up all matters of counterclaim, set-off, claim of damages, demand, or defense whatsoever of the Government against such claim: *Provided*, That should the Attorney-General fail to so answer or demur, the claimant may proceed with the case under such rules as the Commission may adopt; but the claimant shall not in such case have award for his claim or for any part thereof unless he shall establish the same by proof satisfactory to the Commission.

SEC. 11. That the award in favor of any claimant shall be only for the amount of the actual and direct damage which said claimant shall prove that he has sustained. Remote or prospective damages shall not be awarded, nor shall interest be allowed on any claim.

SEC. 12. That all awards of said Commission shall be final unless a new trial or hearing shall be granted by said Commission, and no new trial or rehearing shall be had except upon motion made within sixty days of said award.

SEC. 13. When the Commission is in doubt as to any question of law arising upon the facts in any case before them, they may state the facts and the question of law so arising and certify the same to the Supreme Court of the United States for its decision, and said court shall have jurisdiction to consider and decide the same.

SEC. 14. That the Commission shall file with the Secretary of State a copy of the award in each case immediately after the same shall have been made and become final, and in every case of final award by said Commission the sum found to be due shall be paid out of any appropriation made or to be made by Congress for the payment and satisfaction of such awards on presentation to the Secretary of the Treasury of a copy of said award, certified by the clerk of the Commission and signed by the president of said commission, or by the Secretary of State in case said Commission has terminated and ceased to exist.

All the files and records of said Commission shall immediately upon the expiration thereof be deposited in the office of the Secretary of State.

SEC. 15. That the salaries and compensation of the persons appointed under this act shall be as follows, and the same shall be paid monthly in equal installments:

To each commissioner, the sum of five thousand dollars per annum.

To the Assistant Attorney-General, the sum of five thousand dollars per annum.

To the clerk, the sum of three thousand five hundred dollars per annum.

To such assistant attorneys as may be employed, at the rate of two hundred dollars per month to each for the time of actual employment.

To the messenger and to each stenographer and typewriter, the sum of one thousand two hundred dollars per annum.

To each interpreter, not exceeding the sum of one thousand eight hundred dollars per annum.

SEC. 16. That the powers and jurisdiction hereby granted to said Commission shall be in force and continue for the period of two years from the date of the approval of this act, and for no longer time: *Provided*, That the President may from time to time extend the said period beyond said two years, not exceeding six months in each instance, when in his judgment such extension is necessary to enable the Commission to complete its work: *And provided further*, That in case the Commission shall have completed its work before the expiration of the said two years the President may dissolve said Commission.

Approved, March 2, 1901.

ACT OF CONGRESS GIVING ADDITIONAL POWERS TO THE COMMISSION.

(June 30, 1902. Statutes, 549.)

[PUBLIC—No. 214.]

AN ACT Amending the Act of March second, nineteen hundred and one, entitled "An Act to carry into effect the stipulations of article seven of the treaty between the United States and Spain, concluded on the tenth day of December, eighteen hundred and ninety-eight."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of the act, entitled "An Act to carry into effect the stipulations of article seven of the treaty between the United States and Spain, concluded on the tenth day of December, eighteen hundred and ninety-eight,"

approved March second, nineteen hundred and one, is hereby amended by adding thereto the following provisions:

"Such rules and mode of procedure shall conform, so far as practicable, to the mode of procedure and practice of the circuit courts of the United States. The said Commission created by this act is vested with the same powers now possessed by the circuit and district courts of the United States to compel the attendance and testimony of parties, claimants, and witnesses, to preserve order, and to punish for contempt, and to compel the production of any books or papers deemed material to the consideration of any claim or matter pending before said Commission.

"That the said Commission is also vested with all the powers now possessed by the circuit and district courts of the United States to take or procure testimony in foreign countries. Such testimony may be taken, pursuant to the provisions of existing laws and the rules and practice of the district and circuit courts of the United States, so far as applicable, before the Commission or any commissioner or commissioners appointed under the provisions of this act.

"That the marshal of the United States for the District of Columbia, or his deputies, shall serve all processes issued by said Commission, preserve order in the place of sitting, and execute the orders of said Commission; and outside of the District of Columbia the writs of said Commission shall be executed by United States marshals, or their deputies, in their respective districts.

"That said Commission or any commissioner appointed by it to take testimony in foreign countries is hereby authorized to appoint an officer to serve any subpoena or process issued by said Commission or commissioner.

"When testimony is to be taken before any commissioner appointed by said Commission within any district or territory, the clerk of any court of the United States for such district or territory shall, on application of either party, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or after appearing refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues the subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court; and the production before such Commissioner of any paper or writing, written instrument, book, or other document, may also be required in the manner prescribed in section eight hundred and sixty-nine of Revised Statutes of the United States."

Approved, June 30, 1902.

It will be observed that by sections 3 and 5 of the organic act, March 2, 1901, the Commission was authorized to employ all help for the Assistant Attorney-General's assistance as well as their own, excepting only assistant attorneys, but by act of February 14, 1902, making appropriation for the expenses of the work, it was provided as follows:

"Defense of suits before Spanish Treaty Claims Commission: For salaries and expenses in defense of claims before the Spanish Treaty Claims Commission, including salaries of Assistant Attorney-General in charge, as fixed by law, and of assistant attorneys and necessary employees in Washington or elsewhere, to be selected and their compensation fixed by the Attorney-General, to be expended under his direction, so much of the provisions of the act of March second, nineteen hundred and one, providing for the Spanish Treaty Claims Commission, as are in conflict herewith notwithstanding, thirty thousand dollars;"

and a similar provision has been carried into each subsequent annual appropriation, thus making the work of this office entirely separate from and independent of the Commission.

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REPORT OF WILLIAM E. FULLER.

DEPARTMENT OF JUSTICE,
(SPANISH TREATY CLAIMS COMMISSION),

April 10, 1907.

HON. CHARLES J. BONAPARTE,
Attorney-General.

SIR: On the organization of the Spanish Treaty Claims Commission I was nominated by the President March 9, 1901, as Assistant Attorney-General charged with the defense of claims before that Commission, and have conducted the work to the present time. Owing to many unforeseen circumstances beyond my control the work has been prolonged beyond my reasonable expectations and I have neglected my private interests, and in order that they may not further suffer I have felt it to be both my right and my duty to lay down this public trust imposed upon me by law, and I have therefore tendered my resignation to the President, to take effect May 31, 1907.

Though 542 claims, involving alleged liability of the United States to the amount of more than \$62,000,000 have been filed with the Commission, the proper disposition of which comprehended almost every phase of international law, as well as the rights of United States citizenship in almost every conceivable form and view, yet there is no law making provision for the preservation or publication of the work done and principles laid down by the Commission, except only in the form of the original records, and which can not be accessible or useful to public officers and others specially interested in these questions, and these facts seemed to me to justify, if not require, that a more extended and comprehensive report of the work should be made, than is to be found elsewhere, and as I have had charge of the defense from the beginning and therefore am familiar with the business in all its details, discussions, and decisions, it has further seemed to me specially appropriate that I should submit a report of that character before severing my official relations with the business of the Commission, though the work is not yet completed.

It is not too much to say that no tribunal has ever been called upon to consider, examine, and pass on so many important questions,

both of international law and of nationality, as the Spanish Treaty Claims Commission. Arising as these claims did, in a foreign jurisdiction, and primarily against another nation, they are controlled and governed almost entirely by rules and principles of international law, supplemented in some cases by the municipal law of the nation in whose territory the claims arose. As substantially all the claims arose in Cuba while under Spanish sovereignty, and originally against the Spanish nation, the citizenship of the claimants was the foremost, and in many instances the most important question, as perhaps nineteen out of every twenty of the claimants were former Spanish subjects who had obtained United States citizenship papers, and many claims are in favor of the heirs or widows of such alleged citizens, it follows that almost every conceivable phase of the law of naturalization and citizenship has been brought under consideration and determination.

The rights and duties of a nation engaged in suppressing an insurrection, to what extent it is bound to furnish military protection to the property of neutral aliens found within its territory, and how far a nation may go in the destruction of private property, general devastation of the country, and reconcentration of its inhabitants, in order to suppress an insurrection, have all been brought under consideration, and in a great many ways. A few cases are also among the files, asserting claims which arose after the declaration of war by the United States against Spain, as to which different principles apply and govern.

The responsibility of a parent government for the wrongs done by insurgents has also been presented and urged with all the ability and zeal which able counsel could command, and the conclusion of the Commission that no such liability exists where the insurrection has passed beyond control, though vigorously combatted by counsel for claimants, I believe to be sound, according to international law and adjudicated cases.

As a result of what has been done by the Commission up to the present time, principles have been laid down, rules established, and cases decided covering most of the questions involved, and it is believed but few cases will hereafter come up for determination which do not fall within some of these rules, principles, and decisions.

Another reason why this report has seemed advisable, if not actually necessary, is the fact that in very few cases, perhaps not exceeding six or eight, has the Commission filed opinions, and almost no light can be had from an examination of the orders as entered, and recourse must be had to the original records to ascertain the questions involved, and which were, may, or might have been determined. This is not said in a spirit of criticism, for such has been the practice of all commissions for the settlement of claims of an international

character, but I refer to this fact simply as emphasizing the necessity, or at least the usefulness, of this report.

For convenience I have deemed it best to include with this report the act under which the Commission was organized and the amendment thereto, and they will be found among the exhibits.

As there is no convenient record showing the list of persons under my employ in doing the work committed to my charge, I have also included among the exhibits such a list, showing the persons employed, when, in what capacity, and when the work of those not now in the service ceased, and for what reason. I desire to express my hearty appreciation of the cordial support and faithful endeavor of all those who have been and are now associated with me in the defense of these claims. The work of taking testimony in Cuba has been exceedingly arduous and exacting, requiring sacrifice of personal comfort and at times endurance of hardships not usual in such work in the United States.

Dr. Hannis Taylor, author of a work on international law, a man of learning and ability and a jurisconsult of international reputation, has been engaged as special counsel, and while he has not been charged with much of the work in the way of details, the defense has had the benefit in the argument of cases of his wide knowledge of international law, as well as of the civil law, which is the foundation of the Spanish system of laws. I desire to make special acknowledgment of the services rendered by my two assistants, Mr. Charles F. Jones and Mr. Emory S. Huston. The former has been with me almost from the beginning, and has had special charge of the pleadings and materially assisted in the administration of the business of the department, and in the argument of cases. Mr. Huston has been engaged mainly in the work of preparing briefs and the argument of cases. The work of each of these assistants has been to my entire satisfaction, and I believe with great benefit and advantage to the Government. Mr. Huston has also rendered me valuable assistance in the preparation of this report. I desire also to acknowledge my sincere appreciation of the uniform kindness, courtesy, and consideration which has been extended to me by each member of the Commission during the six years I have been before them, and especially through the long, and at times, heated and trying controversies which they have been called upon to hear and determine.

ORGANIZATION.

The Spanish Treaty Claims Commission was one of the results of the treaty of Paris, following the Spanish-American war. Many persons, claiming to be American citizens, had presented to our State Department claims for damages both to person and property caused

by Spanish and insurgent forces during the recent insurrection in Cuba, which broke out in February, 1895.

Article VII of the treaty of Paris is as follows:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

In order to carry out these provisions Congress passed the act entitled "An act to carry into effect the stipulations of article seven of the treaty between the United States and Spain, concluded on the tenth day of December, 1898," and which act was approved March 2, 1901.

Pursuant to the first paragraph of this act the President nominated Hon. William E. Chandler, of New Hampshire, and formerly Senator from that State; Gerrit J. Diekema, of Michigan; James P. Wood, of Ohio; William L. Maury, of the District of Columbia, and William L. Chambers, of Alabama, as members of the Commission, designating Senator Chandler as president of the Commission. He also nominated William E. Fuller, of Iowa, as Assistant Attorney-General, to make defense for the United States in all proceedings before the Commission. These nominations were all confirmed by the Senate March 9, 1901, and the persons named entered upon the discharge of their duties.

The Attorney-General gave notice March 27, 1901, that the first meeting of the Commission would be held April 8, 1901, and that all claims must be filed within six months from the date of that meeting, with the proviso, found in the organic act, that for good reasons shown the Commission might allow a further period of six months, the effect of which was to allow one year for filing claims.

At this first meeting of the Commission William E. Spear, of Massachusetts, was chosen secretary and a set of rules were adopted.

It soon became apparent that the Commission did not possess all the powers necessary to enable it to carry on the work for which it was created, especially in the matter of procuring evidence, punishing for contempt, etc., and accordingly Congress passed the act entitled "An act to amend the act approved March 2, 1901," etc., being what is generally spoken of as the organic act. This amendatory act was approved June 30, 1902.

CLAIMS FILED.

Four hundred and ninety-five claims were filed within the first period of six months, the total amount of these claims being \$61,087,829.04. Forty-seven claims, in the aggregate amount of

\$1,584, 248.74, were filed during the second period of six months, thus making in all 542 claims filed, and the total amount of these claims is \$62,672,077.78.

Of these claims 152 in number, and aggregating \$2,825,000 (one claim not specifying any amount, but asking an amount "in the discretion of the Commission"), were for damages which resulted, it was claimed, from the wrongful act of Spain in blowing up the battleship *Maine* in the Habana Harbor, February 15, 1898.

THE "MAINE" CLAIMS.

The question whether these claims, known as the "*Maine* cases," came within the terms of the treaty and the jurisdiction of the Commission was the first one of serious importance with which the Commission was called upon to deal, and it was both serious and important. Certainly if Spain had understood that by making this treaty she was agreeing that a local tribunal created by the sole act of the United States, but exercising international powers and jurisdiction, might sit in judgment upon a question so deeply affecting her honor, she never would have signed. But were these claims individual claims against Spain which the United States assumed by the treaty, and which must therefore be tried by the Commission, regardless of all inherent questions, or were they a gross claim primarily in favor of the United States as a nation, and which she expressly waived by the treaty? Whether the individuals who suffered had a direct claim, legal, moral, or equitable, against the United States did not enter seriously into consideration, as Congress has not seen proper to commit any such question to the Commission, whose jurisdiction was limited, plainly, to such claims as were primarily against Spain, the settlement of which the United States had assumed.

The question came up on a demurrer to the claims, interposed by the Government, and which therefore brought sharply before the Commission the legal questions involved. The demurrer was based on four propositions, viz:

1. That the Commission had no jurisdiction over the subject-matter;
2. That the facts stated were not sufficient to constitute a cause of action;
3. That no liability ever existed on the part of Spain, and therefore none arose against the United States by the provisions of the treaty of Paris; and
4. That the claims were not within the terms of the treaty.

The demurrers were argued at length, both orally and in print, the oral arguments occupying several days, and were participated in by several leading lawyers of the Washington and New York bars for the claimants, and for the Government by the Assistant Attorney-

General and his assistant attorneys, and he was also ably seconded by Mr. Charles W. Russell, from the Attorney-General's office. The oral arguments were made in December, 1901, and the opinion of the Commission by President Chandler was handed down March 6, 1902, sustaining the contention of the Government.

The demurrers were sustained on the ground that if there was any legal wrong done in the blowing up of the *Maine* it was against the United States; the injury primarily was national and not individual, the individual soldiers and sailors aboard the vessel at the time having no primary or original rights as against Spain. Therefore, when the United States by the terms of the treaty released Spain from all national claims she released her from all liability on account of the blowing up of the *Maine*, and that no liability then or ever existed in behalf of those who suffered by that disaster, as against Spain, consequently none now existed against the United States by virtue of the treaty and the organic act.

This view was concurred in by four of the Commissioners, Mr. Commissioner Maury filing a separate and able concurring opinion. Mr. Commissioner Chambers filed a dissenting opinion, in which he took the broad ground that there was a wrong done to the individual soldiers and sailors which belonged to them as a primary right; that they did not, on entering the military and naval service of the United States, surrender their individual rights to claim damages for such an injury as was charged in the petitions.

The questions involved in these *Maine* cases are exceedingly important, both to the Government and to the men who enlist in its Army and Navy, and were argued before the Commission with great care and ability. Since the decision the subject has been repeatedly brought before Congress on bills for relief, but no final determination has been reached favorable to the claimants.

I have therefore deemed it appropriate to set out in full the opinion of the Commission and also the concurring opinion of Mr. Commissioner Maury, and the dissenting opinion of Mr. Commissioner Chambers, and they will be found at the conclusion of this report as Appendixes A, B, and C.

The claimants being unable to amend their petitions so as to overcome the objections thus interposed and sustained, the *Maine* claims were all dismissed, and being without other remedy they thereupon asked that their cases be certified to the Supreme Court for review under the provisions of section 13 of the organic act, which reads as follows:

SEC. 13. When the Commission is in doubt as to any question of law arising upon the facts in any case before them, they may state the facts and the question of law so arising, and certify the same to the Supreme Court of the United States for its decision, and said court shall have jurisdiction to consider and decide the same.

This application was denied by the Commission in a brief opinion by Mr. Commissioner Maury, handed down May 13, 1902, as follows:

In answer to the application of counsel that the question of law involved in the above cases should be certified by the Commission to the Supreme Court of the United States under section 13 of the act of March 2, 1901, establishing the Commission, the Commission announces that, having already reached and announced a decisive conclusion in each of the above cases before receiving the application mentioned, it is of opinion that no occasion exists for the action suggested in any of the above cases.

Thus the Commission in effect laid down the not unreasonable proposition that when they had reached a satisfactory conclusion upon any case or question, they could not be expected to certify that they were in doubt as to whether they had concluded rightly or not. No case and no question has been certified under this section, which was couched in unfortunate language if really designed to give a *right* of review.

APPARENT ANOMALOUS POSITION OF UNITED STATES.

Article VII of the treaty of Paris brought about a rather anomalous condition. Up to that time the United States was in the apparent (but not real) attitude of prosecuting these claims against Spain, but, in fact in only one instance, that of Ruiz, No. 112, had a claim been presented in the way of a demand for settlement; in fact, Mr. Olney, Secretary of State, repudiated such idea. Doctor Taylor, our minister to Spain, wrote Mr. Olney that the Duke of Tetuan denied obligation to pay any of these claims, to which the Secretary replied December 29, 1896, and with some asperity that—

As Spain has not been called upon to pay or to acknowledge obligation to pay any of these claims, the general denial of obligation to pay them or to inquire into the facts upon which they are based, made by the Duke of Tetuan, is, at this stage, premature and inadmissible.

He further states that at a later time the claims would be taken up and considered and presented on their merits, but that, so far, what was done was for the purpose of keeping Spain properly advised of what was being claimed against her by individuals claiming to be citizens of the United States.

Of course the United States was claimant, and Spain would be expected to pay all such damages as could properly be charged against her for injuries done to property of American citizens, and the claimants were insistent upon the largest possible amount the facts would justify, Spain resisting. Now the United States takes Spain's place and insists that the claims must be (1) the property of true American citizens, (2) honest and just, (3) lawful under principles of international law, and (4) for a reasonable amount. She could have asked no more of Spain, she expects to do nothing less. Therefore, as already said, the anomaly is apparent, but not real.

QUID PRO QUO THEORY OF CLAIMANTS.

But ever since the claims were filed several of the attorneys for claimants have asserted that under the facts and the treaty the United States has received *quid pro quo* (in the cessions and concessions made by Spain in the treaty) for these claims, and she must pay them—at least as to every claim of which the treaty Commissioners had knowledge while negotiating the treaty, the only question being one of amount, if indeed that question also was not concluded where the amount had been stated. This contention the Government resisted as entirely unsound and unwarranted, and as the allegations which the claimants must make in their petitions and establish by their proofs depended almost entirely on this question, it was important that it should be settled soon, and once for all, by the Commission.

OTHER GRAVE QUESTIONS.

Many other questions of grave importance, both to the claimants and in a more general and enduring sense to the Government, sprang up, and the Commission deemed it advisable to have a general and full discussion of these questions, in order that they might lay down some general principles by which attorneys should be guided in the preparation of their cases, and which should control the Commission in the disposition of cases. Some of the more important of the questions to be discussed may be briefly stated as follows:

1. The extent to which the United States was bound, if at all, in the allowance of claims, by the recognition which the Government had given such claims, in her dealings with Spain and otherwise, prior to the negotiation of the treaty.

2. In making defense to these claims did the United States stand in the shoes of Spain; and if not, where did she stand?

3. What were the rights of American citizens under the treaty of 1795 with Spain; that is, did that treaty, with the protocol of 1877 confer greater rights upon citizens of the United States than those which belonged to citizens and subjects of other nations, including Spain?

4. Did the provisions of that treaty relating to embargoes apply to vessels and their cargoes only, or did they apply equally to property on land?

5. Was Spain liable under any circumstances for wrongs and injuries done by insurgents; and if she was liable, under what circumstances?

6. Did a state of war exist in Cuba during the insurrection of 1895-1898?

7. To what extent might the Commission properly take judicial notice of the acts and doings of both Spanish and insurgent forces during that insurrection?

8. Upon whom rested the burden of proof; that is to say, must the claimant allege and prove the negligence of Spain, or must the defendant allege and prove freedom from negligence; and in case of injury done by Spanish forces, must the claimant allege and prove the acts were done wantonly and unnecessarily, or must the defendant allege and prove the acts were not so done?

9. Is a nation liable in damages for the acts and doings of insurgents where the insurrection has passed beyond the control of that nation?

10. Are reconcentration and devastation permissible acts in suppressing an insurrection?

As no claimant could know what he would be required to plead and undertake to prove until at least most of these questions were settled, their early consideration was desired. The Government therefore selected sixteen cases which embraced the questions relating to responsibility for injuries done by insurgents, and interposed demurrers to all the petitions, which did not, in terms, charge Spain with negligence. These demurrers rested upon the following propositions, viz:

1. That a state of war existed, and the injury complained of was one of the ordinary incidents of a state of war, for which there is no remedy.

2. That the acts complained of were done by insurgents, for whose acts Spain was not, and therefore the United States is not, liable.

3. The facts stated in the petition are not sufficient to sustain an award.

These questions were rightly regarded as of the highest importance, not only as affecting the rights and interests of the claimants but as involving questions of international law, grave in character and far-reaching in consequences. Indeed, the rights of the claimants, large as they were, were overshadowed by the admitted consequences which must ultimately result from the principles to be laid down, which would be regarded as rules to be followed by the United States in future controversies with other nations.

As the questions raised by the demurrers were involved to a greater or less extent in nearly every case before the Commission, it was deemed best that all attorneys who desired to speak on the questions should be heard in the argument. Elaborate briefs were filed and twenty-three attorneys were heard orally for the claimants, the Assistant Attorney-General and three of his assistants participating on behalf of the United States. The discussion consumed about fifteen days, and was had in May, 1902.

In October following, the question of the rights and responsibilities of Spain, in her efforts to suppress the insurrection, was raised by demurrer in a class of cases in which it was alleged that the injuries

were done by the Spanish forces, but it was not charged that the acts were done wantonly or unnecessarily. These demurrers were based on the following grounds, viz:

First. That the acts complained of were the ordinary incidents of war, for which there is no remedy under the law of nations.

Second. That the facts stated are not sufficient to sustain an award.

The discussion of these questions was also very full and complete, as well as the printed briefs. The discussion took a wide range and brought under consideration all the questions above specified upon which the Commission desired to hear argument. It was only natural that where so many attorneys were interested, for so many claimants, there should not be entire harmony in the views expressed, but this only served to intensify the discussion and to bring out into a clearer light the real merits of the various propositions and the very right of the matter, which was the object and end sought by these deliberations.

GENERAL PRINCIPLES OF COMMISSION.

After mature consideration of the questions submitted, the Commission, November 24, 1902, announced six general principles by which they would be governed. After some further discussion, especially as to reconcentration and devastation, the Commission, April 28, 1903, announced five other general principles, in all eleven, which they should follow and counsel should observe as the law, these being, in the judgment of a majority of the Commission, a correct exposition of the questions of international law involved in the cases under consideration, as deduced from the authorities, and from general principles where direct authorities were wanting.

These eleven principles may be briefly epitomized as follows:

1. The liability of the United States is the same which primarily rested on Spain, in no way enlarged by Article VII, treaty of Paris.
2. Belligerent rights were never granted the Cuban insurgents, and war, in the international sense, did not exist.
3. The general rule is that a government is not responsible for acts of an insurrection which has passed beyond its control.
4. The Commission will take judicial notice that the insurrection referred to passed from the first beyond the control of Spain, and so continued until American intervention.

Yet if it be alleged and proved in any particular case that Spain might have prevented the damage by the exercise of due diligence a liability will be held to exist.

5. War existed in a material though not in an international sense, and Spain had a right to adopt such war measures as are sanctioned by the rules and usages of international warfare.

If in any case her acts were in excess of such rules and usages, Spain would be held liable in such case.

6. This Commission will determine what are and what are not legitimate war measures, especially as regards reconcentration and devastation, according to the consensus of nations at the present day.

7. A nation resorting to reconcentration and devastation as a means of suppressing an insurrection beyond control must give to the person and property of a neutral foreigner such reasonable care and protection as the circumstances of each particular case will permit, and this without discrimination.

8. Subject to the above limitations, aliens as well as subjects must submit to and suffer the fortunes of war. Whatever in front of the advancing forces impedes them, or might give them aid when appropriated, or if left unmolested in their rear might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either belligerent; and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting.

If in any case it is alleged and proved Spain failed in her obligations as thus defined, she would be held liable.

9. The treaty of 1795 and the protocol of 1877 were in force during the Cuban insurrection, and they will be applied where appropriate.

10. The first clause of Article VII of the treaty of 1795 relating to embargo and detention has been construed by the United States as embracing real and personal property on land, and this construction has been concurred in by Spain. Such construction will therefore be adhered to and applied by this Commission.

11. The treaty of 1795 will not be so applied as to render either nation liable for damages done to the person or property of the citizen or subject of the other, while in the track of war or during legitimate war operations, unless the same were unnecessarily and wantonly inflicted.

As was to be expected, these principles were not entirely satisfactory either to counsel for the claimants or to the representatives of the Government, but, unfortunately, neither did they receive the unanimous support of the Commission, propositions 2 and 9 only receiving the assent of all. Commissioners Maury and Chambers dissented from all others, and filed dissenting opinions; while President Chandler dissented from No. 10.

Careful and elaborate opinions were filed:

1. By Mr. Commissioner Wood, showing (a) That the liability of the United States, under the treaty, was the same, no more and no less, than that which theretofore rested on Spain, and (b) the extent to which the rules of judicial notice will be applied by the Commission as to the insurrection in Cuba.

2. By Mr. Commissioner Diekema: (a) As to the rights and duties of a nation, where an insurrection within its territory has gone beyond control; (b) the right of a nation, in her efforts to suppress an insurrection beyond control, to use the ordinary war measures, including reconcentration and devastation, and (c) a consideration of the treaty of 1795 as affecting the rights of American citizens, and the duties of Spain in regard thereto.

3. President Chandler filed an opinion in his usual direct and vigorous style, covering nearly all the questions which had been discussed, and supporting the ten principles which met his approbation, by numerous illustrations and authorities.

Several of the attorneys for the claimants had argued, with great vehemence and persistency, that the acts of the Executive Department of the United States Government, in recognition of these claims, and more especially the acts and declarations of the President as to the character of the acts of the Spanish authorities in enforcing reconcentration and devastation, were practically conclusive on this Commission. As one eminent attorney puts it—

This tribunal is bound, not only by the conclusions reached by the political department of the Government concerning its relations with foreign states and with insurgents in foreign states, but it is also bound by every fact upon which the political department of the Government based its conclusions.

President Chandler answers this contention, concluding his answer as follows:

The Commission therefore adhered to its conclusion that its duty is to decide upon the validity of the claims, according to its own views of the pertinent principles of international law and of the facts of which judicial notice is taken or proof is made. The adoption of a different rule, substituting for law and fact the mere declarations and assertions of any officer of the Government, should not be expected of even a temporary United States court.

Indeed, the very terms of the organic act would seem to preclude any other theory, for the first section of the act requires that the claims shall be adjudicated "according to the merits of the several cases, the principles of equity, and of international law," while section 9 requires every claimant to set forth in his petition "the facts upon which such claim is based," a wholly useless procedure, if the facts are concluded by either the treaty or some executive proclamation or declaration.

But the Commission had laid down no new rule or strange doctrine, but were in fact in accord with a decision of the Court of Claims made some years ago. Thus in the case of *Hooper v. The United States* (22 Court of Claims, 408) one of the "French spoliation" claims, the court says, on page 420:

Do subsequent acts of the Executive alone, under these circumstances, acts done in an effort to procure compensation for injured citizens, statements made, and positions assumed in a negotiation, many of them perhaps taken argumentatively, others

perhaps advanced in an effort to reach a middle ground upon which both parties could stand and which would result in substantial advantage to the nation and its individual citizens; do such acts, statements, or positions necessarily bind us here?

The statute which gives us all the jurisdiction we have over these claims requires us to examine, not those claims which the United States advanced, but those claims of specified classes which were "valid and bound the French Government."

It can not be seriously contended that because the Executive pressed a claim that claim was therefore "valid" as between the nations. The act clears any doubt on this point, if there could be any, by prescribing the test we are to apply in ascertaining the validity of a claim; that test is the rules of law, municipal and international, and the treaties of the United States applicable to the same.

Because the President urged a claim upon France it did not necessarily become, as between France and the United States, a valid claim. The rule as to the effect of Executive decisions applies as well in France as in the United States. France, resisting the claim, may contend with equal force that her position is correct, and yet one of the parties to the dispute must be wrong. This *reductio ad absurdum* seems hardly necessary, and yet it serves to illustrate the distinction we seek to make clear as to this court's peculiar jurisdiction. Suppose the decision of the Executive, even in the case assumed, be binding upon the judiciary administering the law within the United States, and the authorities do not go to this extent, still it does not follow that such a decision upon any of these claims is binding upon us now. We are instructed to discover, not what the Executive believed or contended for or argued, but what claims were in fact and in law "valid" as against France, and valid by the rules of law, municipal and international, and the treaties.

Later the Commissioners handed down opinions, both concurring and dissenting, expressing their views upon the questions of law discussed before them, following which they had deduced the eleven principles above set forth. It is seldom, if ever, that a discussion has brought under consideration such a comprehensive array of legal propositions, covering almost every phase of the rights and duties of a nation engaged in an almost life and death struggle for the suppression of an insurrection, and of neutral aliens whose property has been devastated while such conflict was being carried on. The value of the principles laid down depends almost wholly upon the arguments supporting them. It would seem that this report would really be incomplete unless the views of the Commissioners, so abundantly supported by reason and authority, were set forth, and they will be found following the conclusion of this report as Appendix G.

EFFECT OF PRINCIPLES LAID DOWN.

These principles thus settled by the Commission made it clear to the claimants:

First. That an order to recover for damages done by insurgents it was necessary for them to allege and prove that at the time and place when and where the injury was done the Spanish authorities could, by due diligence, and should have prevented such injury; and

Second. That in order to recover for damages done by the Spanish forces it was necessary for them to allege and prove that the acts

done which resulted in the injury were done wantonly and unnecessarily.

And, further, in either case it was inevitable that the acts and conduct of the Spanish officers in immediate command when and where the damages were done would be under close investigation and severe condemnation by the claimants, a course which would be very offensive to Spain.

EVIDENCE FROM CUBA AND SPAIN.

Coming now to the question of obtaining evidence, especially on behalf of the defense, these facts were soon apparent, viz:

1. That substantially all the evidence for and against claims must come from Cuba and Spain.

2. That no treaty or convention of any kind existed with either country by which such evidence could be obtained, either on letters rogatory or otherwise.

3. That about all the evidence would have to be taken in the Spanish language, and be translated; and

4. The circumstances were such that the United States could not expect Spain to be very zealous in aiding the former to reduce the amount of damages to be paid under Article VII of the treaty.

Our relations with Cuba were such that we had no difficulty in negotiating satisfactory arrangements by which the judges of the Cuban courts were authorized and required to subpoena witnesses at the request of the United States, preferred through commissioners appointed to take testimony, and to administer the proper oaths to such witnesses, and provision was also made for punishing for perjury, contempt, etc., and all without charge, and the franking privilege was extended to cover and include the business of the Commission. It was soon found that at least nineteen out of every twenty witnesses spoke Spanish only, and the only feasible plan of procedure was to propound the questions in English, translate them into Spanish to the witness, whose answer was then given in Spanish, translated into English, and the question and answer recorded in English. This required a corps of commissioners to take testimony, official interpreters and typewriters, and the process of course proved tedious and expensive, but nothing better could be devised.

Taking up the subject with Spain, however, it was found very difficult to make any satisfactory agreement. It was soon apparent to the Spanish authorities that there would be much reflection upon and criticism of the acts and conduct of her military authorities in Cuba, especially as most of the claimants felt compelled, in order to plead issuably, to charge Spanish officers with negligence, wantonness, or other misconduct, as already shown. This was highly offensive to

Spain, and but for the fact that it gave her an opportunity to vindicate her officers and defend her honor, it is doubtful whether any agreement whatever could have been made.

The negotiations were, of course, conducted by the State Department, and were continued for nearly two years, when an agreement was reached which, while very unsatisfactory to the United States, seemed to be the best that could be made. Under this agreement letters rogatory were to be issued by the Commission with interrogatories and cross-interrogatories attached, and forwarded through our State Department to the Spanish minister resident here, and he to send them to his home Government for execution and return. This not only put the whole matter in the hands and control of the Spanish authorities, but they expressly reserved the right to refuse to answer any question, and to do so without reason or explanation.

It is difficult for us fully to understand and appreciate the wide difference between judicial procedure in the Latin countries and in our own country. Many of the questions, especially of the cross-questions, were such as to create in the minds of the Spanish officers, whose military conduct in Cuba was under investigation, the impression that an assault was being made upon their honor, in which case their answers would be of no value whatever as evidence under the rules which govern our procedure; it was seldom indeed that they could be induced to make direct and responsive answers to the questions. A notable exception was General Llinares, at the time of testifying minister of war. He waived any right of exemption because of his official position and narrated the facts as to the operations with which he was connected in a simple and straightforward manner, manifesting no pique or ill humor because of any reflection, real or fancied, upon his honor.

It was found necessary also to ask for very many of the orders, reports, etc., of the Spanish officers assigned to particular duties by the general in chief. These documents, it was found had been, upon the evacuation of Cuba, shipped to Spain and stored away in much confusion, and the task of sorting and arranging them fell largely upon our agent there, and at best the result has been unsatisfactory.

Quite a mass of documents and considerable testimony has been procured in the manner thus indicated, but many important documents were not found, and in most instances the testimony of Spanish officers has proven of but little value because of their failure to state facts only, and facts within their own knowledge only. Oral examination by counsel present would have been much more satisfactory, but this the Spanish Government would not permit.

THE CORPORATION QUESTION.

The language of Article VII, above set out, is to be carefully noted in considering this question, viz:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind of either government or of its citizens or subjects, against the other government, etc.

The United States will adjudicate and settle the claims of its citizens against Spain, etc.

Contrasted with this language, nearly every treaty which the United States has negotiated within the last forty years, for the settlement of claims reads substantially as follows:

"All claims on behalf of persons, companies, and corporations, citizens of the United States," etc., and it is specially to be noted that such was the language of the convention concluded with Spain in 1871 for the settlement of claims preferred by the United States against Spain, similar to those pending before the present Commission, and which grew out of the insurrection in Cuba from 1868 to 1878 and known as "The Ten Years' war."

Seventeen of the claims filed with the present Commission, aggregating in amount \$9,487,104.04, are on behalf of corporations organized under the laws of various of the States of the United States. It was soon ascertained that in most of these claims more or less of the capital stock of the corporation was held by Spanish subjects, and in several cases most of the stock was so held. Spain, by the treaty, had expressly released the United States from any liability to Spanish subjects. The question arose, therefore, whether the United States might, nevertheless, be held liable to a Spanish subject for his pro rata share of the loss or damage, because it was held in the form of shares in a corporation. Such a result was certainly not contemplated by the treaty Commissioners, nor could it be fairly assumed Spain understood the words "citizens of the United States" as used in the treaty, as including state-created corporations, and of course it was not a question merely of what the United States understood by those words, but what did the United States have reason to believe Spain understood by the use of those words.

A secondary question was what power has the Commission to deal with such cases, but this did not seem serious in view of the fact that Congress had conferred equitable powers upon the Commission. (See sec. 1 of the organic act.) Language used by Mr. Justice Brewer in the case of *Toledo, etc., Ry. Co. v. Penn. Ry. Co.* (54 Fed. Rep., 746), seems specially appropriate here. He says on page 751:

I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand.

The importance of this question, in addition to its importance as a general proposition, will be apparent when attention is called to the

fact that in one case, the Constancia Sugar Company, the damages claimed are over \$4,000,000, yet of the 5,000 shares of its capital stock outstanding, 4,965 shares are and were, confessedly, held and owned by a Spanish subject. It was deemed best that this important question should be brought directly to the attention of the Commission. The proper method of raising the question was not of easy solution, but the Commission was justly credited with a sincere desire to meet the question, disregarding mere technicalities, and the Government filed pleas in abatement. If the right to make this defense existed, it would seem to follow either that the stockholders who were American citizens should be parties claimant, or that if the corporation were permitted to prosecute the claim it should do so as trustee for those entitled to share. Of course, it was urged in reply that the claim as an entirety belonged to the corporation and the individual shareholders had no interest and so no right to prosecute the claim or any part of it.

After the filing of these pleas in abatement the Commission ordered that what is known as "the corporation question" should be argued by any attorneys representing corporate claimants, both by briefs and orally, who might desire to be heard.

The contention of the Government was—

(1) That corporations organized under the laws of the several States were not "citizens of the United States" within the meaning of Article VII of the treaty of Paris;

(2) That even though the United States so understood the words used, that was immaterial, the question being whether the United States was justified in believing that Spain should and did so understand them;

(3) That in the exercise of its equitable powers the Commission had the right and power to make such order and direction as would protect the United States against liability to Spanish subjects whose claims were expressly released by their own Government, and to this end it might penetrate the fictitious person known as a corporation and apportion the damages; and it does not make against this proposition that the effect may be, in a sense, a dissolution of the corporation. It is, however, more nearly akin to a declaration of a dividend, which a court of equity has the undoubted right and power to order, where justice and equity require it.

Briefs were filed on behalf of nearly all the corporate claimants and for the Government, and the questions were argued orally before the Commission in January, 1904, and February 3, 1904, they entered the following order:

The Commission decides that a corporation may prosecute a claim to adjudication and reserves the right to determine, on final consideration, in case a claim is established, whether any part of the award shall inure to the benefit of a shareholder who, as an individual, could not have prosecuted a claim to adjudication.

No case has yet been determined, in the determination of which there necessarily inhered a decision of the question thus raised, discussed, and reserved.

This is a matter which should receive the serious and careful consideration of our Government. The Constitution commits to Congress the right to make laws concerning naturalization, and no State has the right or power to make citizens of the United States. That State courts do this by permission of and under regulations by Congress does not in any manner affect this proposition, as, of course, when State courts are thus acting by express authority of Congress, they are in effect United States courts. Every State may, under its own rules and regulations, confer the rights of State citizenship, including the right to vote at elections for State and municipal officers and to hold State and municipal office, but this is a very different thing from citizenship in the United States. It is only those persons who are native born and those who have complied with the laws of the United States who are citizens of the United States.

Further, it is only citizens of the United States who are such in the proper and legal sense who have the right to invoke the interposition and action of this Government in their behalf in a controversy with a foreign government. Assuredly foreigners residing in this country are entitled to and will receive a certain kind and amount of protection, but this also is a very different thing from the exercise of that duty of protection which the United States owes to its citizens, and who in turn owe to the Government the duties of allegiance, service, and, if need be, the sacrifice of property and even life itself. The radical difference of course is that when a foreigner who is a resident here removes himself to a foreign country he has divested himself of the only claim he had to protection, viz, that of mere residence.

Now, is it possible that, in the face of these simple propositions, any and every State in this Union may, through its incorporation laws, create a mere fictitious person which the United States must receive, care for, and protect as a citizen of the United States? It is to be carefully observed that (1) many of the States permit a single person to form such a corporation; (2) that very few, if any, deny this privilege to a foreigner, and certainly none denies to such foreigner the right to buy up and own all the capital stock in a corporation, and thus attain the same end, and (3) the same argument in favor of the impenetrable personality of a corporation would of course apply to such a case.

It is true that the Supreme Court, in the case of *United States v. Northwestern Express Co.* (164 U. S., 686), held that a State-created corporation was a citizen of the United States within the meaning of the Indian depredations act, but a mere casual reading of that case

will make it clear (a) such conclusion was reached only by a process of construction peculiar to that case (b) due in large measure to local understanding and construction, which of course can have no application here, and (c) the case is an admission that on principle the proposition is unsound.

THE MORTGAGEE QUESTION.

A good many claims are pending in which it is sought to recover damages for injuries done to property of a Spanish subject on which the claimant, an American citizen, held a mortgage or lien of some kind. Some of these are by mortgagees direct, some by holders of bonds secured by mortgage, and others claim to hold liens on crops, principally of growing cane.

It is contended, of course, that if an estate in Cuba owned by an American citizen was injured under such circumstances as justified an award the owner must be allowed the full damages regardless of whether the estate may be mortgaged to Spaniard or American. But it would seem to follow that if an estate in Cuba owned by a Spaniard was injured, as Spain has released the United States from any liability to her subjects, the full amount of the damages were thus released, regardless of whether they may be mortgaged to American or Spaniard. This main question was also complicated with other questions, such as (a) whether the mortgagor was insolvent, (b) whether the mortgaged estate was yet sufficient to pay the debt, and (c) whether the mortgagee was in the actual possession at the time of the injury, etc.

These questions coming to the attention of the Commission in various ways, it was deemed best that a general discussion should be had on them, and accordingly, May 28, 1903, the Commission ordered that in the cases—

where the claim for damage or destruction of property is presented in behalf of a mortgagee, pledgee, owner of mortgage bonds, or holder of crop contracts or any other kind of lien, whether on real estate or personal property, printed briefs shall be filed by the claimants on or before September 1, 1903, upon the question of their right to recover as such security holders.

Briefs for the Government must be filed on or before October 1, 1903, and reply briefs for the claimants on or before October 15, 1903.

A good many briefs were filed and the questions were fully argued orally. The Commission, however, held their judgment on the merits in reserve, as appears from the following order, entered February 3, 1904, viz:

The arguments on the demurrers in these cases having disclosed that fundamental differences exist among counsel as to the law of mortgage in force in the island of Cuba during the late insurrection, being foreign municipal law, of which judicial notice is not taken, but which remains to be established, the Commission is of opinion that the decision of the question of the right of mortgagees to recover indemnity for

injuries to the mortgaged property should be postponed until the cases are brought on for final hearing, and to that end such grounds of demurrer as raise this question will be overruled without prejudice.

This decision applies to cases of pledgees, holders of any other kind of lien, and holders of crop contracts. (See Docs. and Ops., p. 481.)

This ruling, while perhaps inevitable, was quite unfortunate for this department, as it made it necessary, in every case where the injured property was mortgaged at the time of such injury, whether owned by an American or Spaniard and whether mortgaged to a Spaniard or American, to develop all the facts, to be prepared to meet such rules as might afterwards be laid down by the Commission on these questions.

CITIZENSHIP.

Under no circumstances has there ever come before any tribunal such an array of cases, involving such a multitude of questions on the subject of American citizenship, as those pending before this Commission. This will clearly appear from the following facts:

Taking out the *Maine* cases leaves 390 cases which were filed, these claims aggregating over \$58,000,000. Of these 390 cases, 16 were filed by corporations. Of the remainder, 290 were filed by alleged naturalized American citizens, leaving but about 80 out of 390 claims that were filed by native-born American citizens, while of these 290 who claim to be naturalized Americans the names indicate that nearly all of them are of Spanish birth, and, as developed by the evidence, at least 9 out of every 10 of them returned to Cuba, from whence they came, almost immediately after taking out citizenship papers, took up their regular and ordinary business there, and have continued it ever since, except as they have been compelled by civil wars to flee from the island and demand protection and damages as American citizens. And not only so, but in many cases the evidence tends so strongly to show either gross misconduct in procuring naturalization, or in the subsequent conduct of the claimant as affecting his claim to American citizenship, that I felt it my duty to submit the facts to the consideration and judgment of the Commission.

Cuban property owners suffered grievous losses during what is known as "The Ten Years' war" in Cuba (from 1868 to 1878), and the awards made by the United States and Spanish Commission of 1871 in favor of American citizens who thus suffered doubtless made a profound impression as to the importance and value of such citizenship. As a consequence, there was for some years after 1868 a deluge of applications by Spaniards residing in Cuba for American citizenship, and in some cases where such a course seemed inadvisable resort was had to the plan of incorporating in the United States, as above shown.

But the facts show that, in many instances, these applicants were not content to reside in the United States in good faith the requisite five years, or even to wait that length of time, but the applicant, coming to the United States for his annual summer vacation as he had done for many years, counted that as *residing* in the United States, and was generally able to procure someone, very likely a fellow sufferer, as his witness or "voucher," and who was willing to swear to the same thing. The courts very rarely made any effort to penetrate this legal conclusion of the applicant and his witness and to ascertain the real facts, and citizenship papers were issued almost as a matter of course; and not only so, but in many cases this form of alleged residence, it now appears, was kept up for only four, three, or even two years.

Again: A great many Spaniards resident in Cuba, particularly of the wealthier classes, have been in the habit of sending their children, especially their sons, to the United States for their education, taking advantage of the facilities offered in that line in this country. Apprehensive lest these sons, upon their return to Cuba, might be forced to serve the Spanish, or some revolutionary army, and in order that they and any property which their parents might leave them, as well as any they should acquire, might have the valuable pecuniary protection which they had seen flowing so readily and so copiously through the medium of the talisman "American citizen," these same sons were admonished that before returning to their native land (as a fact to permanently reside, establish their homes and business, with no thought or honest purpose or intention of ever residing in the United States), to take out American citizenship papers. In most instances their complete education required at least five years, and as these usually began at the age of from 15 to 17, no preliminary declaration was required in advance. Accordingly the boy and his witness went before some court and made oath that he was 21 and had resided in the United States five years, and papers were issued.

It may be that the laws of the United States permit minors who are, in effect, emancipated, though residing here merely for educational purposes, to treat such residence as sufficient to meet the lax requirements of our naturalization laws, but if so, they should be amended. But if a son comes to this country for educational purposes, remains under control of his parents, who are foreigners residing in their home land, who pay his bills and direct and control his movements, he certainly is and should be incapable of acquiring a residence of his own, and these facts being shown, even under our present laws (this is written without regard to the amendments of 1906), his application for citizenship should be denied.

These observations are sufficient to call attention to the important questions with which the Commission is called upon to deal. The principal points may be summarized as follows:

(a) May this Commission, in the exercise of its duties in administering international law, look behind and beyond a judgment or order of a domestic tribunal granting citizenship to an alien, with a view to ascertaining whether in good faith and in equity such person is entitled to a standing as claimant before the Commission as a citizen of the United States?

(b) If it may, should the proof it requires be sufficient to set aside the judgment for fraud (remembering that the Commission has no power to set the judgment aside), or should the evidence as a whole be such as to satisfy the Commission that the claimant is not in equity and good faith entitled to a standing before it as such American citizen?

(c) If the proofs show really, beyond a reasonable doubt, that the claimant was not a resident of the United States for more than two, three, or, at most, four years when he obtained his papers, should this be accepted as sufficient to defeat his standing as a claimant?

(d) If a child, born abroad to American citizens, resides abroad when he attains the age of 21, and thereafter continues to reside abroad for a series of years without indicating any purpose or intention of ever coming to the United States to reside, has he elected not to accept American citizenship or is he nevertheless an American citizen? In this connection it is to be observed that many foreign countries have the same law that we have, viz, that a child born in such country is a citizen or subject thereof regardless of the nationality of its parents. (See sec. 1993, Rev. Stat.)

(e) Conversely, if a child, born in this country to foreign parents, who afterwards remove to their own country, taking the child with them, and where they continue to reside as set forth in paragraph (d) above, is such person an American citizen, entitled to a standing before this Commission? (See sec. 1992, Rev. Stat.)

(f) If an American citizen goes abroad and marries a foreign woman, resides in her native country where he is engaged in business for a series of years, and dies there, is his widow *ipso* an American citizen, or has she a right of election between the United States and her native country; and if so, is such election manifested by thus continuing to reside there for a series of years. (See sec. 1994, Rev. Stats.)

(g) If a woman, an American citizen, marries a foreigner, upon his death, whether a resident here or not, is his nationality absolutely fixed upon her, or has she a right to elect her future nationality?

(h) In any case where there is a right of election of nationality, may such election be shown in any way except by actual removal to and residence in the United States?

(i) May American citizenship be lost by abandonment, as by residence and occupation for a series of years in a foreign country, without any intention of returning to the United States to reside?

(k) In such case is it necessary to show nationality acquired elsewhere before loss of American citizenship can be considered established?

There were many other minor questions considered, but these are the most important ones, and their consideration really comprehends and embraces every phase of the subject of American citizenship.

CLAIMANTS SLOW TO PROCEED.

The Government has been embarrassed in the defense of pending claims by reason of delay on the part of many claimants in either (1) not pleading issuably under the rules of the Commission, or (2) in not proceeding with the taking of their testimony and the trial of cases. The defense has persistently urged them to proceed, by motion to dismiss and otherwise, and has had a good many cases dismissed because of such failure to proceed. The real reason for this delay has undoubtedly been because of the fact that many of the claimants, being dissatisfied with the rulings of the Commission, both on the general principles laid down and in the disposition of specific cases, and because of the refusal to certify the "*Maine cases*" to the Supreme Court, as hereinbefore set forth, and which they have probably understood as establishing a general rule on that subject, have been endeavoring to obtain relief through legislative action.

During the past four years they have been very active in efforts to obtain from Congress legislation permitting an appeal, or authorizing a writ of certiorari to issue. During the Fifty-seventh Congress a bill passed the House granting them the right to appeal, which was reported favorably by the Senate Judiciary Committee, but which failed to become a law. In the Fifty-ninth Congress a bill granting the right of review on certiorari in the discretion of the Supreme Court passed the Senate, but failed in the House.

In view of these facts claimants in many cases have made every effort to prevent the trial of their cases, the Government being equally persistent that they should proceed. The Commission doubtless felt that as their rulings had been unsatisfactory to the claimants as well as adverse to them in many cases, they ought not to be too severe with them, and should give them reasonable opportunity to obtain relief from Congress. Most of the cases are of considerable importance, both in the amount of the claims and in the questions involved, and if forced to dismiss their claims they would have no remedy whatever, unless by act of Congress.

While in a certain sense the Commission has the right and power to compel claimants to proceed, yet every lawyer understands that

there are many ways in which cases can be delayed and which a court could not prevent, except by an appearance of an exercise of almost despotic power, and which, as already said, might here appear to be unseemly under the circumstances.

I deem it proper to add in this connection that many claimants have proceeded with their claims and the Government forces have been kept busy, and if claimants generally were ready to proceed it would be necessary to increase the force for the defense—a course, however, much more to the interest of the Government than continued delay.

SPECIFIC CASES.

Before concluding this report I deem it of sufficient importance to justify a more specific statement of a few special cases, the consideration of which presented many of the most important questions above set forth. They show the position which this department has been taking on the important questions under consideration, and in brief the reasons supporting these contentions, and in the main present only new and important questions, avoiding as far as practicable mere questions of fact.

CITIZENSHIP CASES.

THE LACOSTA CASE, NO. 205.

Perfecto Lacoste and his wife, Lucia Lacoste, filed a claim for over \$900,000 for damages done to their estate, about 18 miles westerly from Habana, by both Spanish and insurgent forces.

On the question of citizenship it was shown that Perfecto Lacoste was naturalized by the probate court of Hamilton County, Ohio, in 1878. Section 2165 of the Revised Statutes provides that courts which are competent to naturalize must be courts of record having common-law jurisdiction, and having a clerk and a seal. The constitution of Ohio provided that the probate judge might be *ex officio* his own clerk, and as a fact at the time Lacoste was naturalized the judge of the court was acting *ex officio* as his own clerk, and the certificate of naturalization offered in evidence by the claimants was certified by him in that manner.

Investigation developed a serious conflict in the decisions of both State and Federal courts as to the jurisdiction of a court so constituted and organized to naturalize. On principle the negative seemed to have the best of the argument. The question was fully discussed before the Commission, and there was no disguising the conflict in the authorities and it could not be reconciled. The Commission made an award of substantial damages, which of course comprehend a ruling against the contention of the Government on the question of citizenship.

It is a matter of great surprise to see what questions have arisen, and what efforts have been made to sustain the jurisdiction of almost any sort of a court for naturalization of aliens, most of the contention having arisen over the question as to what courts were courts of common-law jurisdiction within the meaning of the statute. The generally accepted rule now is that a court which exercises any common-law jurisdiction, no matter how little, is a court of common-law jurisdiction within the meaning of this particular statute. As a result county courts, probate courts, State courts, and police courts have been held competent to naturalize. In some instances legislatures have expressly enacted that such and such a court should be a court of record, or should have such and such jurisdiction, this being done for the understood purpose of making those courts competent to naturalize. This indiscriminate and wholesale delegation of this very important power and authority, done, however, first, for political effect, and second, to enable such courts to get the fees, is in a large measure responsible for the wretched work which has been done in the naturalization of aliens and which has resulted in such gross and outrageous frauds being perpetrated on the United States Government in such proceedings.

Of course it was not claimed there was any actual fraud practiced by Mr. Lacoste; it was simply a question of the jurisdiction of the court before which he appeared.

It would certainly seem that the law should be so amended as to limit the right of naturalization to courts having general common-law jurisdiction and having a clerk elected or appointed by authority other than that of the judge of the court.

II.

THE RUIZ CASE, NO. 112.

The case of Dr. Ricardo Ruiz probably excited more comment and was used more effectively to stir up sympathy with the Cuban cause than any other individual case during the Cuban insurrection. Doctor Ruiz took a course as a dentist in a Philadelphia college, and shortly after graduation he returned to Habana, first taking out papers as a citizen of the United States, and opened an office as a dentist. He married a Cuban woman, and at the time of his death he had four children. He had prospered in his business, and was the owner of four small houses in Habana, which he had bought from his savings of fourteen years' practice of his profession there.

He was arrested in Guanabacoa, a suburb of Habana, the night of February 4, 1897, on the charge that he had been connected with the derailling of a train in Guanabacoa by the insurgents shortly before that time and was put into prison *incomunicado*, according to the

Spanish method. It was at once claimed that he was an American citizen, and as such entitled to have his case transferred from the military to the civil tribunal under the protocol of 1877. The settlement of this and other preliminary questions was prolonged and delayed, perhaps necessarily, and until February 17, 1897, when the doctor died, he having been kept the entire time (fourteen days) *incomunicado*, our Government claiming that the Spanish authorities had no right to keep him *incomunicado* more than seventy-two hours under our treaty with Spain and the protocol of 1877, which claim, however, Spain always resisted.

At once upon his death the cry was raised and was industriously spread broadcast throughout the United States that the doctor had been murdered in his cell by Spanish officials. For some days the telegraph wires were almost burned out with red-hot diplomatic messages passing between Washington, Habana, and Madrid about this case. Finally a commission was agreed upon to investigate the cause of his death, Mr. W. J. Calhoun, of Illinois, being the representative of the United States. As might have been and probably was expected this commission did not agree, the Spanish representative claiming that the evidence showed that Doctor Ruiz became deranged and butted his head two or three times against his cell door and caused concussion of the brain, from which he died, while Mr. Calhoun claimed that the real truth was not developed and probably never would be, because of the fear of the witnesses to tell the truth, where the acts of the Spanish authorities were under suspicion.

Thereupon the diplomatic warfare was resumed, and about the time of the blowing up of the *Maine* it had been almost arranged that Spain would pay, say \$20,000, in settlement of the controversy, when that dreadful catastrophe occurred, and all diplomatic intercourse was soon broken off.

As soon as this Commission was properly organized a claim was filed by the widow and children of Doctor Ruiz for \$100,000 damages for causing his death wrongfully, and of course the whole controversy was opened for reinvestigation, including the doctor's citizenship, every claimant being required by the organic act to establish American citizenship as a condition precedent to a right of recovery.

Careful investigation resulted in raising grave doubts as to whether the naturalization papers of Doctor Ruiz had not been obtained by misrepresentation, in that at the time he obtained such papers he had been in the United States but about three years and five months, instead of five years, as required by the statute. The facts, as ascertained by the defense, were accordingly set up in an amendment to the answer, and this was promptly assailed by demurrer interposed by the claimant, it being insisted that this Commission had no right, power, or jurisdiction to look behind or beyond a judgment or order

of naturalization, which it was claimed erected a barrier against any and every such inquiry. As already indicated in the general statement, this resulted in one of the most determined legal contests which has been waged before the Commission, the Government's representatives having reason to believe that a similar state of facts existed in a good many other cases, a similar pleading was filed in a number of them, and the contest became general, as it did not then appear in what or how many cases such a question might be raised and such a defense interposed.

Several preliminary discussions were had when the case of Adolphus Torres, No. 65, in which the same question was raised, was set down for final hearing, and all attorneys interested, or who desired to be heard, were notified to be present and take part in the discussion of this question, but on the day set for the final hearing counsel appeared and announced the death of Torres. The Commission then ordered that the hearing of this citizenship question should be transferred to the demurrer in the Ruiz case, that briefs should be filed, and a new day was fixed for the hearing. On the hearing the arguments were exhaustive, and the objections of the claimants to the right of the Government to make such a defense were urged with vehemence and persistence.

The Commission took the matter under consideration, and on the 28th day of January, 1905, an opinion was filed, Commissioner Maury dissenting (see Appendix E), sustaining the right of the Government to investigate the facts as to the good faith of the naturalization.

The opinion was written by Mr. Commissioner Chambers, and is a very careful, thorough, and exhaustive consideration of the questions involved. The general question, or rather the question on general principles, had heretofore received very little consideration by other tribunals, more perhaps in the hearings before the United States and Spanish Commission of 1871 than all other cases put together, but these were of very little aid, from the fact that the rights of the parties in this particular before that tribunal were provided for and governed by the terms of the convention under which that Commission was acting. The basis of Judge Chambers's opinion was, of course, the well-recognized principle of international law that no nation party to an international controversy can ask that full force and effect shall be given to its municipal orders, rules, regulations, or decisions when brought before an international tribunal, or before a domestic tribunal exercising international powers and jurisdiction (which is but the same thing), unless they are founded upon truth and justice. It was because of this principle that the Geneva tribunal refused to recognize or enforce the decision of an English court in Nassau acquitting the privateer *Florida*, and upon which prize courts, which are but domestic tribunals, reexamine the question of prize or no

prize, though previously passed on by foreign courts; that nations generally look behind the judgments of foreign tribunals which have passed upon the rights of their own citizens in order to see whether, in fact, such citizens have had a fair trial and that substantial justice has been done them.

This question is one of such great importance and is so well and fully treated by Mr. Commissioner Chambers, that at the risk of extending this report beyond what might be deemed a reasonable length, I have concluded to incorporate it herein, and it will be found as Appendix D hereto.

On the last page of this opinion Mr. Commissioner Chambers says something as to the character and degree of the proofs that may be necessary to "overcome" the "conclusiveness of a judgment of naturalization."

It is sufficient now to say on this point that that question was not involved in the case, was not argued by counsel on either side, and it will doubtless be open for further discussion and consideration whenever a case arises which makes it pertinent and proper to do so. However, as the learned Commissioner so clearly demonstrated that as to Spain such a judgment is *res inter alios acta*, it would seem to follow that she had no concern with "overcoming" such a judgment.

After this decision evidence was taken, full opportunity being given to both parties to present any testimony they desired. The Government adduced evidence, mostly from records, including the sworn passenger list of the steamer on which Ruiz arrived in the United States, and which is required by law to be kept and filed in the collector's office, and which showed that Ruiz first arrived in the United States May 16, 1876, or exactly three years, four months, and twenty-seven days before he went before the court with his witnesses and swore that he had resided in the United States five years; and further, the testimony of both the widow and the brother of Doctor Ruiz showed clearly and without dispute that he never was in the United States but the one time. The claimants offered oral testimony of two or three witnesses tending to show that the doctor had been in the United States for the full five years. The Commission did not consider the defense sustained and made an award of \$40,000. It should be added that notwithstanding the restraint upon the witnesses because of fear of the Spanish was removed at the time their testimony was taken, yet there was really no testimony of any importance whatever introduced showing or tending to show that the doctor had been murdered, but neither was the defense able to show any justification for having kept him incommunicado for so long a time.

President Chandler dissented.

III.

THE JEMOT CASE, NO. 187.

Charles Jemot filed a claim for about \$15,000 for damages done to his property and plantation by the Spanish troops about February 24, 1897.

This claimant showed by his own statements, under oath, that he was born in Cuba to American parents; that at the time of testifying he was 51 years of age; that he had never been in the United States except a part of one year, when he was a very small child. Under the rules of the Commission the question of his right to American citizenship was tried in advance as a separate issue. Two defenses were interposed; the first, that as he was born out of the United States, and as the laws of the United States have no extraterritorial effect, he was not upon his birth a citizen in the absolute and unqualified sense, but at most had a right of election, and that upon attaining his majority it was both his right and his duty to elect citizenship. Being outside the jurisdiction of the United States, if he desired American citizenship it was his duty to so elect and which he could do under ordinary conditions only by returning to the United States to reside within a reasonable time after attaining his majority, and this he had failed to do up to the time of the hearing; and second, whatever rights of American citizenship he may have had were lost by waiver and abandonment.

The Commission dismissed the claim. They filed no opinion, but it is probable their decision was based on the first defense above set out. A rehearing was granted and the case was reargued, but the Commission reached the same conclusion as before.

These questions of (1) whether under such a state of facts there exists not an absolute right of citizenship, but a right of election, and (2) it must be exercised within a reasonable time, and (3) it can be exercised only by a return to the United States to reside within a reasonable time, are of very great importance, and it is to be hoped that at some time the Commission will in some of the cases pronounce its judgment upon them. While there would seem to be but little doubt that the contention of the Government is correct, it would be of material assistance, not only in the disposition of the cases before this Commission, but as a guide for the officers of the Government, many of whom have frequent occasion to deal with some of these same questions. It is everywhere admitted that the laws of the United States do not operate *ex proprio vigore* in foreign countries. In so far as they are remedial they may be made effective by those who so desire putting themselves under the jurisdiction of the United States and the laws thereof. But neither can this be done by a mere

setting foot on our shores or a mere temporary stay, and this willy-nilly, as a policeman standing on the dock might put a pair of handcuffs on the man at the same time and place. A decision is also desirable in order that, if adverse to the rights and interests of the Government, suitable legislation may be enacted to cover the case.

IV.

THE LOPEZ CASES, NOS. 45 AND 67.

Manuel Felipe Lopez filed two claims, one for \$100,000 damages for the death of his son, Segundo Narciso Lopez, who was killed by Spanish forces April 11, 1896, the claimant charging that his son was murdered by the Spanish troops, while the defendant claimed that he was killed in an engagement, the son at the time acting and operating with the insurgents. The other claim, for \$2,000, was for injuries done to property.

On the question of citizenship it was claimed that the father was naturalized in New York June 23, 1869, and that the son was then a minor residing with him, and he thereupon became a citizen also. The father was naturalized as one who had come to the United States when a minor under the age of 18, and who had continuously resided in the United States from that time until he was naturalized, which statement, if true, would entitle him to citizenship without having made the preliminary declaration as required by the statute in other cases, and which he had never made.

The father testified in his own behalf, and he showed (1) that he first arrived in the United States in 1834; (2) that of the thirty-five years which elapsed from that time until his naturalization he had been in the United States but about fifteen years; (3) that of the five years immediately preceding his naturalization he had been in the United States but about six months and (4) of the one year immediately preceding his naturalization he had also been in the United States but the same time; (5) during the time when he was not in the United States he was in Cuba with his father's family, carrying on business of a more or less permanent character, and apparently without any purpose or intention of ever returning to the United States to reside.

On the final hearing of the first case, No. 45, the Commission, after hearing part of the argument, directed that the question of citizenship be submitted in advance, and subsequently announced that the claim was dismissed, and of course holding that that issue had been found against the claimant.

V.

THE RABEL CASES, NOS. 140.

These three claims were filed by Gaston Rabel and Julio B. Rabel, doing business as Rabel & Co., the first for \$1,765 for damages caused by the Spanish Government in using a lighter from April to October, 1898; second, for \$4,500 for losses sustained by reason of damages done by the insurgents to an estate on which they held a mortgage for that sum, and the third, a claim of a similar character to the one last mentioned, in the amount of \$21,500.

In these cases the facts as to citizenship showed that the claimants were born in the United States to American parents, but were taken abroad by their parents during their early years, afterwards attending school in foreign countries most of the time during their minority, and residing in Cuba almost all the time since attaining their majority, and where they have been and are now engaged in business as bankers and otherwise. They were residing there at the time they became of age, and they never have done anything whatever in the way of electing American citizenship, and they never have come to the United States to reside and do not claim they ever expect to do so. Their parents went to France in 1856 or 1857 and thence to Cuba about 1865, where the father engaged in business and where they resided during the remainder of their lives.

Thus it will be seen that the question in these cases is exactly the reverse of that in the Jemot case; that is, in these cases the children were born in the United States, while in the Jemot case the child was born abroad to American parents.

It was contended by the Government that the principle was exactly the same, and that the Rabels had a right of election only and which they must exercise within a reasonable time after reaching the age of 21. Of course the Rabels at birth were within the jurisdiction of the United States, but while infants residing abroad the right of American citizenship, which the law conferred upon them, was in the nature of an inchoate right, which they were at liberty to make absolute when they reached the age when they could exercise a choice. This is not a limitation upon their rights, but is a benefit and advantage to them, as it gives them the choice and it is not a hardship if they be required to make an election of such choice, and make it within a reasonable time. When they became of age the United States was powerless to exact from them the performance of any duty or obligation whatever of American citizenship, either by personal service, or by paying taxes, and the like. The obligations should be reciprocal, and if they desired the protection of the United States Government they should in some unequivocal way show that

they stood ready to discharge the duties and obligations of American citizenship, and which they could do at least under ordinary circumstances only by returning to the United States to reside and thus put themselves in the way of discharging, or, if need be, of compelling them to discharge their reciprocal duties.

The cases were dismissed by the Commission, and, though filing no opinion, it must have decided them against the claimants for want of American citizenship, and this, of course, for want of an election.

VI.

THE BETANCOURT CASE, NO. 466.

Gaspar A. Betancourt filed a claim for \$50,000 for damages for wrongful arrest and imprisonment by the Spanish authorities.

The claimant died January 29, 1904, intestate, and his personal representative was substituted. It appeared from the evidence that the decedent left five sons and daughters, three or four of whom (depending on the ruling in the case of one concerning whom the testimony was conflicting) were Spanish subjects. The Commission concluding to make an award, it was urged on behalf of the Government that the heirs who were Spanish subjects were incapable of inheriting, and that in any view of the case an award could be made only in favor of such heirs as were citizens of the United States and for their pro rata share of such damages as the Commission might find the decedent would have been entitled to had he survived. The Commission concluded otherwise, and made an award February 28, 1905, of \$10,000 to "the personal representative" of the decedent. It is probable the Commission were influenced in their conclusion by the fact that without doubt the original claim was released by the United States by Article VII of the treaty, and that if the heirs could not receive compensation through this claim they could receive none at all, as Spain would undoubtedly answer a claim presented by her own subjects that it had been released by the United States.

VII.

PETER PLUTARCH ORTIZ, NO. 89.

This was a claim for damages done to property to the amount of about \$85,000. The case was decided against the claimant on the question of his right to a standing as a citizen of the United States.

He obtained from the court of common pleas of New York City a certificate of naturalization July 9, 1877, and this he did by proceeding under section 2167, United States Revised Statutes, which permits one who comes to the United States when under 18 years of age

to obtain naturalization on attaining the age of 21 without having made a preliminary declaration of his intention to become such citizen two years prior to his application. Said section 2167 provides that—

Any alien being under the age of twenty-one years, who has resided in the United States three years next preceding his arrival at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, etc.

The record showed without any serious difference that the claimant was born in Cuba of Spanish parentage June 28, 1843, and that he first came to the United States in either March or April, 1862, and he was therefore almost 19 years of age when he first came to the United States. It also appears that he was married in Cuba in 1874, and that he went to Cuba at least five or six times between the date of his first arrival in the United States and the date of his naturalization, but the evidence fails to show the length of time he remained there during these visits with any definiteness.

The Commission held, Commissioners Maury and Chambers dissenting, that the claimant had failed to make out his case for lack of citizenship. While it is not so directly stated in the record it is understood that the holding was that the claimant had practiced fraud upon the court; that he had in fact obtained his naturalization without having made any previous declaration of intention to become a citizen by falsely swearing before the court that he first came to the United States when under 18, and that as he was over 18 a previous declaration of intention was an absolutely essential prerequisite, without which his naturalization was illegal.

This ruling has been made in a number of cases, and it may now be considered as the settled rule of the Commission that false swearing as to some of the essentials of naturalization, as for instance that he was under 18 when he first came to the United States, or that he came to the United States when under 18 and had resided continuously in the United States down to the time of his naturalization, while in fact he had been absent from the United States for one or more periods of one or more years' duration, will defeat the right of the claimant to a standing before the Commission as a citizen of the United States.

VIII.

URCELLES CASE, NO. 523.

This was a claim for destruction of property of the value of about \$12,000.

The claimant obtained naturalization papers in the city of New York April 8, 1885, as one coming to the United States when under 18 years of age. The evidence showed that the claimant first arrived

in the United States August 16, 1880, coming from Baracoa, Cuba, in the schooner *Annie D. Merritt*. There is a little confusion in the name on the passenger list of the schooner, but the claimant himself testified that he came on that vessel about that time; that it was his first trip to the United States, and that he never made but the one trip. He was therefore in the United States but four years seven months and twenty-three days when he applied for and obtained citizenship papers, the statute requiring, of course, a five years' residence. The date of his arrival was fixed by the sworn passenger list, which the captain of the vessel filed with the collector of the port on his arrival in New York, and which he was by law required to make under oath and file.

The case was dismissed by the Commission December 31, 1906, "for lack of citizenship." The case may, therefore, be taken as settling the proposition that if the evidence satisfies the Commission that the claimant had not in fact resided the full five years in the United States before taking out his naturalization papers he would be denied a standing before the Commission as a citizen of the United States. Other cases had the same question involved, with others. Therefore it could not be absolutely determined upon which ground the case was decided, but in this case no other question of citizenship was raised or considered, and the case may, therefore, be regarded as an authority to the effect that such a misrepresentation made to the naturalizing court was a fraud on the court and upon the law, and whether practiced knowingly or innocently the result must be the same. There is no question but that there may be a legal fraud committed, though without moral turpitude.

CASES OF ALLEGED NEGLIGENCE.

I.

THE LACOSTE CASE, NO. 205.

This case has already been referred to under the head of "Citizenship."

Perfecto Lacoste and his wife, Lucia Lacoste, filed a claim for about a million dollars, as damages done to their sugar estate near Habana, by both insurgent and Spanish forces. Their estate formed practically the northwestern limit of the invasion under Gomez and Maceo. They spent the night of January 6, 1896, on that estate and separated the next morning, Gomez going southeasterly with a part of their forces. Maceo moved first through the Lacoste estate westerly, burning most of the cane as he went and being closely pursued by the Spanish forces. That night he passed back through the Lacoste properties in the direction of Habana, and the next day

again passed westerly through the claimant's estate, where he was overtaken by the Spanish forces and they had something of a battle.

Cattle and horses were taken by the insurgents and some by the Spanish. Later a Spanish force was stationed on their properties, and a reconcentration camp was established in and about their batey, there being at one time from two to three thousand reconcentrados there. The evidence also tended very strongly to show that a Spanish garrison, as well as Spanish columns, came there occasionally on their operations and did much and unnecessary damage to the mills and buildings on said estate.

By far the greater part of the loss was occasioned by the burning of the cane during the army movements above referred to. It was not claimed that there was any negligence on the part of the Spanish forces at and about the time and place when and where the damage was done, but it was claimed that the Spanish authorities were negligent in permitting Gomez and Maceo to continue their raid through the island as they did; that if due diligence had been exercised in the use of the forces at their command the Spanish could have driven the insurgents back, or have crushed them, but the evidence in support of this claim was of a vague and indefinite character. This contention of the claimant was not sustained, probably because in any view the evidence did not sustain it. An award of \$150,000 was made, but the order shows that it was made for (1) personal property appropriated by the Spanish authorities, (2) for use and occupation of a part of the estate as a reconcentration camp, and (3) for damages done to the property during its occupancy.

This case was the first one in which there was presented the broad claim that negligence in failing to arrest and overcome the insurrection at some former time and place, no difference how far removed and how long a time had elapsed, might be shown and be the basis of a recovery. It was pressed upon the attention of the Commission, however, with vigor by counsel for claimant, but it was not until the final hearing in the Hormiguero case, hereinafter referred to, when the matter received full consideration and was again urged by counsel, not only with vehemence, but apparently with confidence in the soundness of the proposition.

II.

THE MAPOS SUGAR COMPANY CASE NO. 121.

The claimant, a New Jersey corporation, filed a claim for about \$400,000 for property destroyed during the insurrection, almost entirely by the insurgents, and the claim was substantially for cane burned, the plantation being situated in Santa Clara Province.

The claim was based largely upon the charge that Spain was negligent in not furnishing sufficient protection. On the hearing, however, it was shown that the boundaries of the claimant's estate were about 40 miles in extent, and that quite a small army would have been required to protect such a property. It was further shown in this case, as well as many others, that a favorite method of burning cane quite generally adopted by the insurgents was for two or three men during the night to slip into cane fields and scatter balls of phosphorus covered with wax. The next day the hot sun would melt the wax and ignite the phosphorus, and thus fire the cane in many places, the perpetrators of the outrage in the meantime having removed themselves many miles from the scene of their malicious mischief.

It was virtually conceded in the argument that Spain could not have properly furnished a sufficient number of guards to prevent such acts of destruction, and the Commission held that it had not been shown that Spain was negligent in failing to do so in this case. An award of \$30,362 was made in favor of the claimant, but nothing was awarded for cane burned by insurgents or because of the alleged negligence of Spain in not preventing such acts.

III.

THE HORMIGUERO CENTRAL COMPANY CASE, NO. 293.

This claim amounted to about \$800,000 and was for damages done to a sugar estate near Cienfuegos owned by the claimant, a New Jersey corporation. It was nearly all for damages done by insurgents, and, as heretofore shown, it was necessary for the claimant to allege and prove that Spain, in the exercise of due diligence, might have prevented the injury.

This of course is a very broad proposition and the field open to the claimants is a very wide one. Apparently it has been the practice with former tribunals, when adjusting claims of an international character, to permit almost any and everything, and in almost any and every shape and form in which it is offered in evidence, to be "received for what it is worth." While it may be freely admitted that such a rule in a certain sense tends to develop the facts and to give the parties the fullest opportunity possible to establish their claim or defense, yet it puts an almost intolerable burden upon the parties and stuffs the record enormously. Naturally, the claimants resorted to every possible avenue to discover something in the acts and doings of the Spanish military authorities upon which to base a charge of negligence, and the defense felt under obligations to follow the claimant through all its explorations and rakings, in order to develop the whole truth of the

particular matter charged, knowing that however incompetent it might be regarded, the evidence would not be excluded, and being received, unless the whole truth were shown, the facts thus brought in by the claimant might create a prejudice in the minds of the court, to the substantial hurt of the defendant.

The most striking illustration of what has just been said is to be found in the record of this case. A careful examination of this record, including the briefs of counsel for claimant, will satisfy the mind that there never has been known in the history of tribunals for the settlement of international claims such a broad, unlimited, and unrestricted license asserted to traverse, criticise, and condemn the acts and conduct of a nation in her efforts to prosecute a war in which she was engaged to a successful issue. This unbridled and unrestricted liberty was asserted the more freely because (1) they were the acts of a country whose conduct had been the subject of severe comment and often equally unbridled condemnation by both public officials and private persons in our own land, and (2) it was constantly and persistently urged that the United States had received *quid pro quo* for these claims under the provisions of the treaty of Paris and ought to pay them. Doubtless these facts contributed their share in influencing the Commission to permit claimants the fullest opportunity and liberty in their attempts to establish their claims and that they might not have occasion or opportunity to complain that they had not been permitted to explore this, that, or the other field of promise.

The Hormiguero Central Company acquired, owned, and operated a large sugar plantation near Cienfuegos, and was so doing during the insurrection in Cuba. The first general contest between the insurgents under Gomez and Maceo and the Spanish forces took place at Mal Tiempo December 15, 1895, very near the claimant's estate. Both Gomez and Maceo were present, it being the movement known as "The invasion." The insurgents vastly outnumbered the Spanish troops present on that occasion, and defeated them. Immediately after the battle, and the same day, the insurgents moved into the claimant's plantation, where they camped for the night, and most of them remained in that vicinity for three or four days. Up to the time they left there, and on leaving, they burned and destroyed most of claimant's cane; also many buildings, fences, farming implements, etc., but the batey, including the mills, machinery, principal buildings, etc., were protected and were not molested by the insurgents, the batey being also some miles out of the line of their march. The great bulk of the claim was for damages done by the insurgents at the time and under the circumstances thus briefly set forth.

Though there were some general allegations in the petition tending to show that there had been negligence at the time and place of the

injury, barely sufficient to save the case from attack by demurrer, yet in the proofs nowhere was an attempt made to sustain that charge, nor was it so claimed on the argument.

But in taking the evidence the claimant asserted the right to and did take up every movement of any importance from the time the insurgents started west on their invasion early in the summer of 1895 in the far eastern part of the island, and long before the forces of Gomez and Maceo were united for that movement. It was charged that at every point of importance, the crossing of a river, or the crossing of a trocha, or the passage through a mountainous region, the Spanish forces might have destroyed the insurgents, but failed to do so because of their alleged negligence, and but for which the invasion could not have been continued, and the property of the claimant would not have been destroyed, the broad claim being asserted that the entire movements from the time the insurgents first started westerly from Santiago Province, and even long before the leaders joined their forces, was a single transaction, and therefore everything relating thereto was competent evidence, as a part of what might be called the *res gestae*, which culminated in the battle of Mal Tiempo and the destruction of claimant's property. And not only so, but it was boldly stated as a fact that Spain before the insurrection began was negligent, in that she was not properly prepared to resist and overcome an insurrection, should one break out, and that this was negligence also competent and pertinent, and but for which claimant's property would not have been destroyed.

The startling nature of these unlimited propositions may be better understood by a home and homely illustration; for instance, on the same line of argument, if President Buchanan and his Cabinet could be shown to have been negligent in not preparing to suppress the insurrection in the South, or if Fitz John Porter could have been found to be negligent at Bull Run, or Grant at Shiloh (what foreign tribunal sitting in a foreign country might not so find?), and, further, that but for such negligence the rebellion would have been crushed, then it would necessarily follow that the United States was liable for all property thereafter destroyed, except possibly that of those who had joined the Confederacy during the rebellion, and this, of course, regardless of any kind of negligence at the time and place of the injury, or, in fact, at any other time and place than the one so found. So the argument was that if Spain could be found to have been negligent in failing to defeat either Gomez or Maceo at the crossing of the Jucaro-Moron trocha, or the crossing of the Zaza River, or the crossing of the Arimao River, or the passing of the Siguaneya, at each of which points it was claimed that the insurgents could have been dealt a death blow, according to the doctrine contended for by the claimant, either of these failures would have rendered

Spain liable for all damages thereafter done to foreigners by reason of the insurrection, though caused by the movement of the armies in the field or even in actual battle. This must follow, for if such negligence can reach forward and cover property destroyed at Mal Tiempo, 300 miles distant therefrom and several months before that battle, there could be no limit placed during the entire insurrection.

Nearly 10,000 pages of evidence were offered, and the substance of all of which was printed by the claimant, this constituting a printed record of about 1,350 pages, and the oral arguments occupied eight days. Of course, as the evidence introduced covered such a limitless field, the Commission could not well do less than hear counsel, and they were heard with unwearied patience and unflagging attention. Though the same ground had been gone over in the main in former cases, yet, on account of the magnitude of this claim and the broad propositions persistently and aggressively urged upon the attention of the Commission, this case came to be regarded as more in the nature of a test case on these claims so confidently asserted.

The claimant examined 88 witnesses and the defendant 21. The claimant was represented on the hearing by William V. Rowe and William F. Corliss, of the firm of Sullivan & Cromwell, of New York City, who argued the case with great detail, particularity, and persistence, the opening by Mr. Rowe alone consuming four days. The brief for the defendant was prepared by E. S. Huston, assistant attorney, and on the hearing the case was argued for the defendant by the Assistant Attorney-General, by Dr. Hannis Taylor, special counsel, and Mr. Charles F. Jones, assistant attorney.

Counsel for claimant argued and urged every possible view of every feature of the case upon which to base an argument or claim of liability, taking up, as already said, the individual acts of individual Spanish commanders at every place of importance in the eastern half of the island from the outbreak of the insurrection until the battle of Mal Tiempo, December 15, 1895, and every act of any importance done or not done by the Spanish commanders during that time was the subject of special consideration, disapproval, and condemnation as an act of negligence sufficient to entitle the claimant to base an alleged liability thereon. As already said, the case came to be looked upon as not only a leading one, but a test one, and all the claimants desired to know the result before they should be required to further proceed with their own cases, recognizing, as they then did, that if the Hormiguero Company could not recover for property losses under the facts set forth and the claims asserted in their case it would scarcely be necessary for many of the property claims to be further prosecuted.

It was the hope and expectation of the claimants that on account of the importance of this case and the care with which it was tried

the Commission would file an opinion covering the whole case, and thus in effect lay down rules which would govern others in the presentation of their claims. The Commission, however, filed a memorandum decision or opinion, and which is so brief that it is deemed best to set it out here in full in order that there may be no misunderstanding as to just what the Commission did say and hold, the dissenting opinion of Mr. Commissioner Maury being also set out. These are as follows:

[Opinion No. 35.]

SPANISH TREATY CLAIMS COMMISSION.

HORMIGUERO CENTRAL COMPANY v. THE UNITED STATES. (Case No. 293.)

OPINION OF THE COMMISSION

Declaring the nonliability of Spain for damages done by the insurgents; filed August 15, 1906.

Commissioner CHANDLER. The memorandum now filed states briefly the reasons for the decision by the Commission not to make an award against the United States in this case on account of any alleged failure of Spain to exercise due diligence when the property of the claimant was destroyed by the Cuban insurgents. An extended opinion may be delivered later.

I.

In this case it appeared that the Cuban insurgents on the 15th day of December, 1895, destroyed the sugar cane growing on the claimant's plantation at Hormiguero. These insurgents were a part of the armed forces of Gomez and Maceo which in July, 1895, started from Santiago Province and moved westward until they reached Pinar del Rio in January, 1896. It was contended by the claimants that their evidence showed that this invasion of the insurgents would have been arrested before Hormiguero was reached if there had not been a gross negligence and inefficiency at various times and places on the part of the commanders of the Spanish troops, particularly—

(1) In not making preparations against the landings of the Cuban generals, Maceo and Gomez, in March and April, 1895, and the outbreak of the rebellion;

(2) In not preventing the landing of the Roloff-Sanchez expedition in July and the distribution of its arms and ammunition;

(3) In the failure of General Nario to arrest Maceo's advance at Victoria de las Tunas in October;

(4) In the failure of the Spanish generals to prevent the insurgents from crossing the Jaruco-Moron trocha in October;

(5) In the failure of General Garich to operate effectively at the Zaza River in November; and

(6) In the failure of Generals Oliver and Luque to prevent the passage of the forces of Maceo and Gomez through the defile of the Siguanea later in November.

II.

Upon the case thus presented it is decided by the Commission that the contention of the claimant above set forth is not sustained by the evidence in any of the particulars specified.

III.

The Commission having previously held that the insurrection from the first, as a whole, went beyond the control of Spain, and it appearing and being conceded by the claimant in this case that the Spanish troops did not fail to use due diligence on the

15th of December at Hormiguero, it is questionable whether the Commission is authorized to review the military situations and operations at the various times and places mentioned, so remote were they from the 15th of December and Hormiguero, and to condemn the plans, acts, and omissions of the military commanders as proving such a lack of due diligence on the part of the Spanish authorities as to make Spain liable for the damages done by the insurgents at that time and place. At all events, it is certain that no legal precedents have been found which would, in our opinion, justify the Commission in entering upon such a review and condemnation.

IV.

It is further held as to any other claims of negligence set forth in the petition of the claimant that at no time and place did the Spanish authorities so fail to exercise due diligence as to make Spain liable for the damages done by the insurgents at the Hormiguero plantation.

V.

An award is made in favor of the claimants for \$10,000 in satisfaction for buildings destroyed by mistake on or about December 15, 1895, and for horses appropriated on or about October 20, 1896, by the Spanish authorities in the island of Cuba.

It is also adjudged that upon the other causes of action alleged in the petition the claimant is not entitled to further relief.

DISSENTING OPINION OF COMMISSIONER MAURY.

Commissioner MAURY. I am unable to concur with my brethren in their opinion in this case.

In my judgment the military art, as other arts, has its foundation in common sense, and may be challenged to answer at that bar.

When, therefore, the Spanish captains flew in the face of the truth, patent to the simplest mind, that "horses are quicker than men afoot," by employing infantry to quell an insurrection maintained by cavalry, ranging at will with sword in one hand and torch in the other, they committed a gross and inexcusable violation of common sense and ordinary diligence, and did no little to foster the belief that their disposition was rather to allow the insurrection to linger on for the sake of the pelf or promotion, or both, it was bringing them. How far that belief was founded will be shown at another time.

As I apprehend, hardly anything could be more reprehensible than the failure of Colonel Merrino to make even an effort to capture the munitions of war landed by the Roloff-Sanchez expedition and deliberately carted by the insurgents through the country from their landing place and delivered into the hands of Gomez, who was in straits for ammunition and just starting on that terrible "invasion," made more terrible still by those supplies, whose track through Hormiguero and the rest of the island was soon to be marked by the burning cane fields and homes of peaceable American citizens.

It is said that Colonel Merrino was ordered before a court-martial and sent back to Spain in disgrace. The wonder is that he was not shot, considering the enormity of his offense.

These two instances of gross and far-reaching dereliction of duty by the Spanish authorities in Cuba were, in my judgment, sufficient to make Spain liable for all the damages done the Hormiguero Central Company by the insurgents. In the first instance Spain's negligence pervaded the whole insurrection. In the second and the other instances relied on by the claimant, Omniscience alone can tell how far the mischief extended, and it seems arbitrary and unjudicial, not to say presumptuous, to speculate about it. The safe rule of civil and criminal justice is that the wrongdoer's liability can not be qualified or apportioned in any way. Of necessity, then, the wrongdoer, if a nation, is as much in subjection to the principle as an individual.

Later Judge Maury filed a more extended opinion. (See Appendix F.)

The doubt expressed by the Commission as to its authority to review military situations and operations at remote times and places was taken up by this Department, and has been more fully presented in the brief in the case of Atkins & Co., No. 387, and it is hoped some more decisive action on the question will be taken by the Commission on the final disposition of that case.

IV.

THE BROOKS CASE, NO. 120.

Richard K. Sheldon, executor of the last will and testament of Paul Brooks, deceased, v. The United States, was a claim arising out of damages to the sugar estate Los Canos, situated in the district of Guantanamo, Santiago, Cuba. The total damage to the estate was claimed to be \$504,115.51. The claimant's testator, Paul Brooks, was the owner of seventeen-seventy-fifths of said estate and brought suit for seventeen-seventy-fifths, to wit, \$114,266.78. The damage in this case was largely for cane, bridges, buildings charged to have been burned by fires set by the insurgents. There was a large amount of testimony taken which was very conflicting. The estate was so surrounded on two sides by woods and thick underbrush that it made an absolutely safe hiding place. It was located near the line of travel from the eastern part of Santiago Province to the western part. Several thousand insurgents were located in different bands and made their attacks frequently on Spanish forces. There was much fighting in the mountain district some miles to the west of this plantation. The evidence showed, particularly the certified copies of reports of officers of the operations in and around Guantanamo, that the Spanish forces were diligent and that a guard was established on the different plantations. That on the estate Los Canos there was a guard at two different places on the estate. Also shown that the Spanish forces regularly patrolled the country. Captain Aultman, of the United States Army, made a careful examination of this plantation and he reported that it would have taken several thousand men to have protected this estate from fires set by insurgents. The Commission did not find any lack of diligence on the part of Spanish forces, but did make a finding of \$500 for wire appropriated, also for money paid mobilizados with the understanding that it was to be repaid. Case argued April 10-12, 1906.

V.

THE ATKINS CASE, NO. 387.

Edwin F. Atkins, trading and doing business as E. Atkins & Co., filed a claim for about \$250,000 for damages done to his sugar estate Soledad, situated 12 or 15 miles from Cienfuegos. As set forth in the petition, the damages were chargeable almost equally to the Spanish and to the insurgent forces. As to those charged to the insurgents, they consisted, as usual in such cases, almost entirely of cane burned, there being a small amount claimed also for cattle and horses taken and for injuries done to a railroad bridge and locomotive owned and used by the claimant.

In this case also there was no specific charge of negligence "at the time and place of the injuries" on the part of the Spanish forces, but the charges were of a vague, indefinite character, relating to the general character and conduct of the war by Spain.

In view of the doubts expressed by the Commission in their memorandum decision in the Hormiguero case as to their authority to review military situations and operations at times and places remote from the time and place when and where damages were done, we went carefully over the whole subject in this case, hoping that the Commission might resolve the doubt into a certainty and thus eliminate the one annoying and expensive time-consuming feature of these expensive and time-consuming cases.

The case was decided December 22, 1906, an award of \$62,496.53 being made in favor of the claimant. This was composed of \$55,929.26 allowed for amounts paid by the claimant for maintaining a private guard for the protection of his property from September 30, 1896, to April 30, 1898, Commissioners Diekema and Wood dissenting; \$3,840.37 for money wrongfully exacted by the Spanish commander, and \$2,726.90 as the balance due for cattle taken and consumed by the Spanish forces and partially paid for. Nothing whatever was allowed for cane destroyed, Commissioners Maury and Chambers dissenting.

The Commission expressed no further opinion on the question of reviewing the general military operations and conduct of Spain in carrying on war.

In regard to the award for the expenses of maintaining a private guard the precedent would be a dangerous one but for the fact that it was claimed, and there was evidence tending to show that it was done under such circumstances as justified the claimant in believing that the money so expended would be refunded. It is a dangerous precedent, however, in that it seems to permit him to exercise his own judgment as to how many men he should hire and use, Spain to

foot the bill. Of course if such a proposition could be sustained under principles of international law, then no Government could safely consent that a private property owner might hire any forces whatever as a private guard for his own individual property.

That the case was peculiar, however, and not a precedent is made quite apparent when it is observed that this case was tried and submitted with the case of Beal & Co., No. 250, they being tried together really as one case. The estates were adjoining, and Mr. Atkins, the sole claimant in No. 387, was a partner in Beal & Co. In the latter case there was also a claim for expenses of supporting the private guard, and under different facts and circumstances from those in the Atkins case. An award of \$1,037 was made in the Beal case as the value of certain cattle taken and consumed by the Spanish forces, but nothing whatever was allowed, either for money expended in maintaining a private guard or for cane burned. Commissioners Maury and Chambers dissented from the conclusion that the claimants were not entitled to further relief.

VI.

CENTRAL TERESA SUGAR COMPANY CASE NO. 97.

By this claim it was sought to recover \$1,256,000 by the claimant, a New Jersey corporation. Of this amount \$910,800 was for cane burned by the insurgents. The claim does not differ materially from other claims for property destroyed by the insurgents, except as to \$100,800 which it is claimed resulted from the burning of cane by insurgents February 27, 1895, but three days after the breaking out of the insurrection, and which it is charged resulted from the negligence of Spain in failing to repress and suppress the uprising at Calicito February 24, 1895, that place being but a very short distance from the Teresa estate, it being claimed also that the band of eight men who gathered at Calicito went to the Teresa estate augmented to the number of twenty, and while there burned cane to the value of that sum.

There was evidence tending to show that the Spanish authorities were forewarned of the expected uprising at Calicito, and there was also evidence to show that the Spanish authorities did what they could with the limited forces and supplies then at their command to prevent the outbreak, which it was then supposed would not be serious. There was no evidence, however, even tending to show that the Spanish authorities knew the insurgents intended to go to the Teresa estate, or that they were there, or that they intended to destroy claimant's property. Further, the testimony to the effect that the insurgents did this particular burning was very weak and circumstantial only.

As to the balance of the claim for cane burned, amounting to \$810,000, it was not seriously contended that Spain could or should have prevented it.

A garrison of Spanish soldiers of from 30 to 100 in number was maintained on the Teresa estate from early in the insurrection until July 27, 1896, when they were withdrawn without notice or warning to the owners. It is claimed that immediately upon the departure of the garrison the insurgents entered upon the estate and damaged the owners to the amount of about \$90,000, but the evidence tended to show that this garrison, together with others, was ordered withdrawn by General Campos about June 30, 1896, and sent to their command, and it also tended to show that while the garrison at Teresa was withdrawn the others mentioned in the order were not then withdrawn, some of them being removed later and some of them possibly not at all. There was also evidence tending to show that General Bosch, in command at Manzanillo, became much incensed at Mr. Rigney, in charge of the Teresa estate, and spoke very harshly to him and of citizens of the United States.

It was claimed for the defense (1) that General Bosch's language was immaterial, but the question is, what was it that he did or did not do; (2) that it was his duty to obey orders to withdraw the garrison; (3) that his failure to do his duty and withdraw garrisons from other estates as ordered did not make the withdrawal from the Teresa estate wrongful; (4) that Spain had the right, in the exercise of her judgment and discretion, to withdraw any troops then guarding private property and return them to their commands whenever the proper authorities deemed it advisable and essential to the success of the Spanish forces in the field, and (5) that the facts did not make out a charge of unjust discrimination.

The claimant also presented an item of \$250,000 damages for being deprived of the use of the damage money for so many years; in other words, interest, but which could not be asked in direct terms because forbidden by the organic act. This claim was not seriously urged, as it was plainly without legal foundation.

The case was argued at great length on the final hearing, special stress being laid on the claim that Spain, having been forewarned as to the anticipated operations at Calicito, was guilty of gross negligence in failing to prevent it. There was much evidence, however, tending to show that it was generally understood that if an outbreak occurred it would be a small affair and of a temporary character; that the Spanish forces on the island, and especially those within that locality, were limited in number, and that such reasonable efforts were made by the proper authorities as could have been fairly expected under all the circumstances. The case was disposed of by

the Commission January 31, 1907, and an award was made in favor of the claimant for \$33,670.81, the order of award saying:

being the damages caused by the neglect and failure of the Spanish authorities in the island of Cuba in the years 1896, 1897, and 1898 to afford due protection to claimant's property, accompanied by discrimination practiced against it as an American citizen.

Commissioners Maury and Chambers, while concurring in the award made, dissented on the ground that claimant was entitled to other and further damages.

VII.

CENTRAL TUINICU SUGAR-CANE MANUFACTURING COMPANY CASE, NO. 240.

This claim for nearly half a million dollars presents an interesting variation in the way of a claim to recover for cane destroyed by the insurgents. The claim is made that a specific act of negligence at the time and place of the injury has been established by the claimant within the exact letter of the principles laid down by the Commission.

It appears that complaint was made to the general in command at Sancti Spiritus that the company desired to make this crop, and that the insurgents had threatened, and in fact given written notice, that if they undertook to cut or grind, their property would be destroyed. There is some conflict in the testimony as to the exact extent to which the general went in promising protection. But within a day or two he sent a force of about 350 Spanish soldiers to the estate, and they, with the employees, commenced the erection of fortifications in and around the batey. Very soon after this work was begun, perhaps the next day, the insurgents were seen setting fire to the cane fields at a distance of about 3 miles from the batey, the cane fields extending a distance of about 6 miles from the batey. The evidence tended to show that the Spanish authorities made no direct effort to prevent the burning, but remained within the batey, and the work of destruction went on for several days and until the cane fields were substantially all burned.

It was contended for the claimant that it was gross negligence in the Spanish commanding officer not to send out some portion of his forces to drive away the insurgents and to try to prevent them from burning the cane, while it was contended on behalf of the defense that it was a serious question for him to consider whether he should divide his forces, substantially all infantry, sending out perhaps half of them a distance of several miles from the batey, and possibly so weaken his forces as to make it possible, if not probable, for the insurgents to come in and capture the remainder and destroy the mills and machinery in the batey itself; and this was a question of discre-

tion and judgment on the part of the commander, not clearly negligence on his part, and therefore not subject to review by the Commission.

“TRACK OF WAR” CASES.

I.

THE FORTIN CASE, NO. 7.

This was a case of property, mostly cane, destroyed by the Spanish forces.

Claimant's plantation, Encrucijada, was situated at a cross-roads, as the name indicates, an important junction point for the insurgents who had their general camp in the Rubi Hills in that vicinity. The evidence showed that the insurgents were in the habit of camping on that estate, as it had running water and facilities for hiding, lying in ambush and the like, and it was so used by them, their outposts in the foothills being able to see the advancing Spanish columns in ample time to notify the main body of insurgents, who were thus enabled to make such disposition of their forces for attack, defense, or retreat as the occasion seemed to require, and there had also been some fighting in the immediate neighborhood, though not on the day of the destruction.

So far as this property was concerned, the award was for the defendant, and the Commission evidently held it to be a justifiable destruction under principle No. 8 above referred to, for it was not contended that liability could be evaded on any other ground. Principle No. 8 reads very plainly, but in its application to a given state of facts there was always room for contention as to whether or not the facts brought the case within that principle, the language of which was necessarily general.

The Commission made an award of \$650 in this case in favor of the claimant for cattle and horses taken and used by the Spanish forces, President Chandler dissenting.

A similar award has been made under like circumstances in a good many cases, it being understood that at least a majority of the Commission are in favor of making an allowance for any property taken and used by the Spanish forces, and this apparently without regard to whether its destruction would have been justified under principle No. 8, already referred to.

In the Court of Claims the rule is understood to be that if the primary object and purpose is to weaken the enemy the fact that the army obtains some incidental benefit, as, for instance, by using certain cattle for food, instead of killing them and leaving the carcasses on the ground to rot, will not change the rule and create a liability.

It was so held in *Conard et al. v. The United States* (25 Ct. Cls., 433), a case which grew out of the order of General Sheridan for the devastation of a certain district of Loudoun County, Va.

The question thus far considered relates solely to the property of neutrals so taken and used or destroyed. Another class of cases will be referred to in which the question was as to whether or not there was a liability for property belonging to the subjects of the enemy.

II.

THE DELGADO CASE, NO. 151.

José Gregorio Delgado filed a claim for \$181,534, \$50,000 for personal injuries and the balance for property destroyed on his plantation near Bainoa, Habana Province, about March 4, 1896.

The facts, briefly stated, were that on the morning of that day General Maceo, with about 2,500 insurgents, appeared from the west and camped on claimant's estate for breakfast at the usual Cuban breakfast hour of about 11 a. m., their camp being in and about the batey situated near the western boundary of the estate. Shortly after and while these insurgents were preparing and eating their breakfast General Melguizo appeared also from the west with a Spanish column of about 1,000, who at once drove in the insurgents' outposts and prepared for a fight. There was something of an engagement upon claimant's estate, claimant's evidence belittling it as an exchange of a few scattering shots, while the testimony for the defense tended to show that there was a considerable preliminary engagement, and as General Maceo's forces were almost out of ammunition he ordered a retreat, which was soon conducted across claimant's estate in an easterly and southeasterly direction.

At the same time and during the melee claimant's cane was set on fire at several points and it was almost wholly destroyed. The testimony was very conflicting, that for the claimants tending to show that the cane was burned by the Spanish and after the insurgents had disappeared, while that for the defense tended to show that it was fired by the insurgents as they disappeared, in order to cover their flight, they being without ammunition. The question was whether there was a liability for cane destroyed under such circumstances. Here again there was no doubt about the general rule as laid down in principle No. 8, and while this seems plain enough, yet in its application to specific cases there is a wide field open, and whether any particular case is within or without these principles will be found to be influenced by and to depend upon a great variety of circumstances, as, for instance, what is the "track of war;" does a field of cane impede the advancing forces, or if left unmolested might it afford

aid and comfort to the enemy? These questions alone, it will be seen, suggest almost an unlimited field for investigation. General Miro testified that the burning of the cane under such circumstances was very useful to one of the parties as erecting a wall of fire between them, which of course is true and would be of great benefit and advantage to the fleeing party.

No opinion was filed by the Commission. An award of \$30,000 was made in favor of the claimant for personal injuries, but nothing for property, and it almost necessarily follows that the Commission found that the cane and other property was destroyed under such circumstances as avoided any liability therefor under the principle above referred to.

APPROPRIATION OF LIVE STOCK.

I.

THE ALMAGRO CASE, NO. 44.

Luisa Calvo de Almagro filed a claim for \$50,800 for property, including buildings destroyed and live stock carried away and used, all by the Spanish forces. The claimant's plantation, La Noria, was situated at a short distance easterly on the coast from the Habana Harbor, and was in a locality where it was frequently overrun by both Spanish and insurgent forces.

The evidence tended to show that the buildings and other property were useful to the insurgents and were made use of by them for purposes of shelter, food, etc., and that troops frequently secreted themselves there, in the meantime a delegation of them entering Habana secretly on missions in the interest of the insurrection.

The evidence also showed that the claimant had a large number of cattle, mostly cows for dairy purpose, kept on the estate and that these were taken and appropriated by the Spanish forces as food. For these the Commission allowed \$7,500 under the principle adopted in the Fortin case above referred to, Commissioner Chandler dissenting, but allowed nothing for the destruction of the plantation generally, Commissioners Maury and Chambers dissenting from that part of the order.

II.

THE VAN SYCKEL CASE, NO. 135.

The petitioner presented a claim for \$5,000 as the value of certain cows taken by and appropriated to the use of the Spanish forces. The evidence showed without much conflict that the claimant owned the cows, and that they were taken, or at least a part of them, and

were used as food by the Spanish troops, and it also showed without dispute that they were so taken after war had been declared between the United States and Spain.

Here was presented the question as to whether or not the army of a nation at war with another may take and use the private property of individual citizens of the enemy country without liability therefor. That there was no liability for property so taken and used has undoubtedly been the rule from time beyond history down to substantially the present time will be admitted, but it is claimed that in modern times the harsh rules of war have been modified, and among others this one, and that private property of enemy subjects should be respected, and if taken and consumed should be paid for, at least unless so done under the rules of principle No. 8, above referred to. The rule contended for by the Government seems to have been plainly supported by the Supreme Court of the United States in the case of *Brown v. United States* (8 Cranch, 110), where the court says, on page 122:

Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation the judicial department must give effect to its will. But until that will shall be expressed no power of condemnation can exist in the court.

The Commission held otherwise, however, and made an award of \$7,500, President Chandler dissenting.

DAMAGES DURING WAR WITH SPAIN.

I.

THE SPANISH-AMERICAN IRON COMPANY CASE, NO. 410, AND THE JURAGUA IRON COMPANY CASE, NO. 411.

A few other cases have been brought which ask for compensation for property injured or destroyed after the declaration of war against Spain by the United States, and in a good many cases damages which it is claimed resulted during that time are included with a claim for damages done before that time. These two cases it is understood are of the former class, the proofs which have been quite, if not entirely, taken showing without dispute that the damages claimed for were all done after April 21, 1898.

The question of liability or no liability was presented and argued upon a demurrer interposed by the Government to the petitions, but at the earnest solicitation of claimants the Commission decided to defer the ruling on the question until the final hearing. The cases will be ready for submission at an early date.

On behalf of the Government the following propositions were submitted, and will be again urged on final hearing, viz:

1. On the declaration of war between the United States and Spain, citizens of the United States became enemies of Spain and their property became enemy property, and Spain was under no obligations to further protect such property.

2. Upon the declaration of war against Spain by the United States the treaty of 1795 became terminated; Spain so expressly declared and the United States made no protest or objection, and has never since asserted that said treaty, or any part thereof, was in force after that time.

3. If it be claimed that Article XIII of that treaty was expressly made to be effective in case of war between the two countries the answer is—

That Spanish sovereignty over the island of Cuba ceased by relation, at least as early as April 20, 1898, when the United States, by its duly empowered authorities, declared Cuba free, having by the sword and by treaty made good this declaration, and it became effective by relation as of that date, and when Spanish sovereignty ceased Cuba was no longer Spanish territory, and not being Spanish territory Article XIII of the treaty of 1795 had no further application in that territory.

As to such damages as were charged to have been done by the insurgents after April 20, 1898, the propositions are:

(a) That upon the declaration of war the United States became the ally of the insurgents, joined with them in a common enterprise, to wit, the expulsion of Spain from Cuba, and each was responsible for all damages done by either or both.

(b) This was not only a recognition of the belligerency of the Cubans, but of their independence as well, and of itself was the equivalent of a declaration of war.

(c) Thereafter Spain's duties and obligations could no longer be measured on the basis of the duties of a nation with regard to the suppression of an insurrection, but only on the basis of one nation at war with another.

(d) Thereafter Spain was no more responsible on the basis of negligence in not controlling or suppressing the insurrection than for not controlling or suppressing the United States.

These questions, though discussed on the demurrer, have not yet been fully discussed as they will be on the final hearing, but their importance will be apparent on a mere reading of them.

MEMORANDUM.—Since the foregoing matter was prepared the evidence has been taken and the cases submitted on final hearing. The facts developed in the evidence showed that the claimants were corpo-

rations, operating iron mines about 20 miles easterly from Santiago, with wharves on the seashore for shipping ore, and railroads running from the mines 2 or 3 miles inland to the wharves, and thence along the seashore to Santiago. It also clearly appears that they were fully protected by the Spanish forces and were continuously in operation during the insurrection and until the declaration of war by the United States against Spain.

Upon the declaration of war, Spain stopped the operations at the mines and took possession of such of the property as it desired to use, such as railroad, telephone, machine shops, etc., and so continued until the morning of the day when the United States fleet appeared in sight, with the evident purpose and intention of effecting a landing at the wharves of the claimants. As soon as the fleet was seen standing in, and the object being apparent, the Spanish forces, which of course were small and unable to offer any substantial resistance, made immediate preparations to evacuate, and did so during the forenoon, after destroying some of the property, such as locomotives, cars, wharves, machine shops, tools, machinery, etc., and taking away the horses and equipments. Of the property destroyed, a small portion might properly be classed as nonmilitary, such as hospital supplies, laboratories, etc. The United States force at once effected a landing, and immediately set about to restore the railroad track, cars, engines, bridge, telephone, etc., to a condition of usefulness and to make use of same, the best possible proof of the military character of the property, and they so continued to use it until the peace protocol was signed.

On the final argument the questions were presented by the defense under the following heads, to wit:

I. Claimant's property not within the terms of Article XIII of the treaty.

II. Spain terminated the treaty April 23, 1898.

III. The United States never objected to the act of Spain and no court can do so.

IV. The United States ratified and confirmed the act of Spain.

V. Spanish sovereignty in Cuba ceased April 21, 1898.

VI. Self-preservation, the highest law and the first duty of a nation.

VII. The claim that Article XIII remained in force, under the circumstances, is inequitable.

VIII. Liability aside from the treaty of 1795.

IX. All damage during Spanish-American war.

X. Damages done in "track of war."

XI. Specifications of damage.

On the oral argument it was virtually conceded that all of the treaty of 1795 except Article XIII fell with the beginning of the war, but it was claimed that that article, being designed to take effect only in the event

of war between the two countries, remained in force. It was argued for the defense that the United States had expressly claimed and asserted the right to denounce treaties whenever it saw proper to do so, and did so notably in regard to the French treaties, which were abrogated by act of Congress of July 7, 1798, and also in the Chinese-exclusion treaties. Notwithstanding these illustrations, however, the Commission seemed to doubt the right of one party to a treaty to denounce it, unless the right to do so was expressly reserved. The case will probably be disposed of on other grounds.

Further, it was claimed by the defense, even though said Article XIII remained in force, yet it could not aid the claimants, which were corporations engaged wholly in the business of mining, shipping iron ore, whereas said article was by its express terms limited to the protection of merchants, to which class it could not be fairly said that the claimants belonged, though counsel for claimants so urged on the argument.

It was also insisted in argument for the defense that Spain did not by Article XIII of the treaty barter away her right in case of war to do whatever was necessary to preserve her existence, and that the right granted by that article of the treaty must be in subjection to the higher duty of Spain to preserve her sovereignty and territorial integrity, and that notwithstanding that clause of the treaty the damages alleged were war damages, for which there could be no recovery.

Much reliance was placed by the claimants upon the decision made by this Commission in the Van Syckel case, No. 135, heretofore referred to, as establishing the proposition that if the private property of an alien enemy be taken for use it should be paid for. That claim, however, was decided on the ground that the property was taken for the support of the army as food, and the taking was in no sense a war measure or military operation, and that property taken or destroyed as a war measure or in military operations does not establish a liability against the taking government, as shown in the case of *Hijo v. The United States* (194 U. S., 315).

The case is now in the hands of the Commission for final determination.

MISCELLANEOUS CASES.

I.

THE WEST INDIA OIL COMPANY CASE, NO. 110.

The West India Oil Company filed a claim for \$10,044.75. The principal part of the claim is the alleged value of a certain quantity of oil stored on the wharf in Manzanillo and which was thrown into the sea during the bombardment of that city by the American fleet,

it being the judgment of the persons so ordering that it was necessary to do so in order to save the city from a great conflagration. The persons present and making such order were, some of them, officers of the municipality, some of them military officers of Spain, and some of them merchants.

The claim also included a small amount as the value of certain oil seized by the public authorities in Santiago for the purpose of lighting the public streets when the bombardment of that city was also imminent, the city being out of lighting material.

The Government claimed as matter of defense, first:

That the acts done were the acts of the municipalities and not the acts of Spain. That if any right of action ever existed it was against the municipalities and not against Spain; that as the claim never existed as against Spain it could have no existence under the treaty as against the United States.

And further as to the oil thrown into the sea, it was an act done for the public safety, similar to that of destroying a building to stop a conflagration, and for which it was virtually admitted there was no liability, except as created by some law or ordinance, and it was not claimed that any such existed in Cuba, but it was contended that there was a liability under article 10 of the Spanish constitution, which reads as follows:

The penalty of confiscation of property shall never be imposed, and nobody can be deprived thereof except by a competent authority and for sufficient cause of public utility, always after the proper indemnity has been paid.

Should this requisite not precede, the judges shall protect, and, in a proper case, restore the possession to the person whose property has been taken.

On final hearing an award of \$532 was made for the oil taken to light the streets of Santiago. Nothing was allowed for the oil thrown into the sea. Commissioners Maury and Chambers dissenting.

II.

THE CARBIN CASE, NO. 519.

Helen M. Carbin, as administratrix of the estate of William L. Carbin, entered a claim for \$700,000 damages, caused, as alleged, by the order of General Wood while acting as military governor of Cuba, by which a certain valuable and exclusive franchise held by Mr. Carbin for the slaughtering of animals in Habana was annulled and destroyed to his damage in that sum.

The claim was twice heard on demurrer, raising the question of liability, and June 30, 1905, an order was entered by the Commission dismissing the petition.

III.

THE NOBLE CASE, NO. 237.

Adeline M. Noble filed a claim for \$3,800, based on the following facts:

Sometime prior to April 20, 1898, she rented her house in Washington, D. C., for the use of the Spanish legation under a written lease extending through the years 1898 and 1899. Upon the declaration of war against Spain by the United States the Spanish minister vacated the premises and left the country and refused to make further payments of rent, whereby she lost said sum. The case was heard on demurrer, raising the question of liability on the facts as set forth in the petition. It was heard on briefs filed and the defense was also heard orally.

After consideration the Commission held, February 7, 1905, that there was no liability, filing the following opinion, handed down by Mr. Commissioner Maury:

[Opinion No. 32.]

SPANISH TREATY CLAIMS COMMISSION.

ADELINE M. NOBLE *against* THE UNITED STATES. (Case No. 237.)

OPINION OF THE COMMISSION, DELIVERED FEBRUARY 7, 1905.

A contract of lease running from December 1, 1897, to November 1, 1900, between the Government of Spain and a citizen of the United States, for a dwelling house in the city of Washington, D. C., for the occupation of the Spanish envoy, the rent therefor to be paid by the Government of Spain in monthly installments, was annulled by the breaking out of war between Spain and the United States on April 19, 1898, and, consequently, the lessor's claim for rent after that date is not sustainable.

Commissioner MAURY. This case arises on demurrer to claimant's amended petition, from which it appears that claimant, Adeline M. Noble, a citizen of the United States at the time of the occurrences now to be stated, on the 19th of April, 1897, leased to the Government of Spain for the use and occupation of the envoy of said Government at the city of Washington the dwelling house in said city known as No. 1785 Massachusetts avenue, together with certain furniture therein, the said lease to begin on December 1, 1897, and to end on November 1, 1900, being for the term of two years and eleven months, and for the consideration of eleven thousand and eighty-three dollars and ten cents, payable in equal monthly installments, in the current money of the United States.

Spain, through her envoy, took possession of the premises under the lease and displayed the national colors therefrom, and continued so to occupy the same and to pay the monthly installments of rent until April 19, 1898, when war broke out between the Governments of Spain and the United States, and the envoy of Spain received his passports from this Government and left the United States, completely abandoning the said premises, which remained so abandoned by Spain until May, 1899, when, peace having been reestablished between the two countries, Spain, through her envoy,

resumed possession of the said premises and occupied the same and paid rent therefor as provided in said lease up to the time when the lease was to expire by its own terms.

But the petitioner complains that the rent for the said premises from the time of the outbreak of the war to the time of the reoccupancy thereof by Spain in May, 1899, amounting to the sum of \$3,800, has not been paid, Spain having refused, as petitioner alleges, to pay the same because of the war made upon her by the United States Government.

In consequence of this failure and refusal of Spain to pay rent for the period of the war, petitioner avers that she has a claim against the United States, under the treaty of peace with Spain, for the said unpaid rent of thirty-eight hundred dollars.

It remains now to inquire whether the amount demanded is included among the claims relinquished to Spain and assumed by the United States by force of said treaty.

It may be stated as axiomatic that war *ipso facto* puts an end to unlicensed trading and intercourse of every kind between the citizens or subjects of the hostile governments and between either government and the citizens or subjects of the other. (*The Rapid*, 8 Cr., 155; *The Julia*, ib., 181; *Griswold v. Waddington*, 16 Johns., 438; *Hanger v. Abbott*, 6 Wall., 532, 536; *United States v. Grossmayer*, 9 Wall., 72; *Desmare v. United States*, 93 U. S., 605.)

And from this principle we have the necessary deduction that executory contracts valid before war are annulled by it if they can no longer have effect without such unlawful trading or intercourse. (*Hanger v. Abbott*, 6 Wall., 532, 536; *The William Bagaley*, 5 Wall., 377, 407.)

When members of a firm become public enemies the war which makes them such at the same time destroys the contract of partnership, because the vital principle of the contract is freedom of intercourse between the partners, which, of course, would be repugnant to a state of war. (*The William Bagaley*, 5 Wall., 377, 407; *Griswold v. Waddington*, 16 Johns., 438, and authorities cited in these cases.)

For a similar reason war dissolves the contract of life insurance where the parties to it have become public enemies of one another, it being fundamental to the contract that the assured should pay the premiums on his policy promptly when they fall due, which a state of war would not permit. (*New York Life Insurance Co. v. Statham*, 93 U. S., 24.)

The whole doctrine is conveniently summarized by the Supreme Court in the important case of *The William Bagaley* (5 Wall., 377, 407): "Executory contracts with an alien enemy, or even with a neutral, if they can not be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress."

In this state of the law, we must hold the lease between Spain and Mrs. Noble to have been abrogated by the breaking out of hostilities. To uphold the claim would nothing less than to say that during the war Spain had the right to occupy as tenant premises situated within the territory of the United States, her enemy, and pay rent therefor to the claimant, with whom, in common with every other citizen of the United States, Spain was at war. An order will be entered as follows:

Ordered, In the case of Adeline M. Noble, number two hundred and thirty-seven (237), that the demurrer be sustained and the petition be dismissed, it being the judgment of the Commission that the claimant is not entitled to any award in her favor.

IV.

THE HERNSHEIM CASE, NO. 297.

This claim grew out of the order of General Weyler, issued May 16, 1896, prohibiting the exportation of leaf tobacco after ten days from that date.

It was claimed that 1,200 bales of leaf tobacco had been bought prior to that date for the original claimant, but the same was green and could not possibly be packed and put in condition for shipment within the ten days. After some negotiations the Spanish Government consented that foreigners who had in fact and in good faith bought leaf tobacco before the order was issued should have the right to export it after, as well as within, the ten days allowed by the order. As the claimant was required to show but two things, viz, (1) citizenship and (2) ownership in good faith prior to May 16, 1896, it would seem a very simple proceeding for the claimant. Several attempts were made, however, and it was not until about June 24, 1897, that the proofs were accepted by Spain as sufficient and the property was released.

It was claimed that in the meantime the tobacco had suffered very great depreciation from various causes, amounting in all to \$68,050.98. The evidence was conflicting and confusing, but the Commission evidently found that there was unreasonable delay in the release of the property, as an award was made December 22, 1906, for \$23,848, President Chandler dissenting and Commissioner Maury not sitting.

It was urged in defense, among other things, that as the claimant (the original claimant having been a Louisiana corporation) entered Cuba for the purpose of making these purchases at a time and at a place where the insurrection was raging and the entire island officially proclaimed in a state of war, it took its chances on a speculation growing out of those conditions, and therefore should be held to have taken all risks, but evidently the Commission did not take this view of the case.

Incidentally this case involved the corporation question hereinbefore considered to this extent:

The owner of the property at the time of the injury was a corporation. Later the directors undertook to wind up the corporation, and this claim was then put in the hands of a trustee to collect for the benefit of the former stockholders, and the claim was presented in his name as such trustee. It turned out on the hearing that two of the former stockholders were foreigners, and the Commission reduced the award according to the percentage which their stock bore to the entire capital stock. Their holdings were small, however, being but three hundred and thirty-two twenty-five hundredths of the whole.

V.

THE VICTORIA COMPANY CASE, NO. 141.

This was a claim for \$567,637.93, all of which, except \$52,000, was for cane burned by insurgents. The case, therefore, presented the clean-cut question whether or not Spain was shown to have been negligent by showing (1) that the cane was burned by insurgents; (2) that there was but a small garrison of Spanish soldiers furnished, sufficient only to protect the mills, machinery, buildings, and appurtenances usually found in a sugar-making establishment, the whole of which is usually designated as the "batey;" and (3) with a larger force, say several hundred instead of a score of soldiers, would have been able to save the property.

The question of how much a Government is bound to do in the way of protecting the property of neutral aliens in case of war, and especially in case of a revolution, is, of course, to be determined from all the facts, such as (a) the character and extent of the revolution; (b) the resources of the parent Government in the way of men, money, and army supplies, and their ability to put armed forces in the field; and (c) to what extent could these have been drawn upon by the Government; (d) the amount and character of the property belonging to both natives and foreigners (for the property of the former is entitled to protection equal with that of the latter); (e) to what extent the armed forces of the parent Government and other resources can and should, under all the circumstances, be set apart for the protection of private property; (f) the demands which the exigencies of the conflict make imperative, and which, in the very nature of things, must be regarded as of not only the very highest, but also of the very first importance for the success of the national army, for it needs no argument to show that if the national sovereignty can not be preserved and upheld there can be no protection whatever for private rights and interests.

The growing of sugar cane and the manufacture of sugar in Cuba not only far exceeded any other, but all other industries on the island. Knowing this, and for the purpose of demonstrating the power of the insurrection, crippling Spain, and to force the laboring people into the insurrection, General Gomez, as early as July, 1895, forbid, in the most positive terms and under the most severe penalties, the doing of any work in the fields in the cultivation of sugar cane, or in the bateyes in the manufacture of sugar, destruction by fire being the almost certain, if not inevitable, consequence of disobedience to his orders.

The vast areas of land devoted to the growing of sugar cane in Cuba, and the ease with which it could be set on fire by even one man during

the dry season when the cane was ready for grinding, and the fierce and uncontrollable character of the fire when once under headway, made the problem of protection the most serious one with which the Spanish authorities had to deal—next only to actual warfare in the field.

After the trial of many cases and the consideration of much testimony, in addition to the facts of which the Commission takes judicial notice, the conclusion was reached by the Commission, though never announced in so many words, that Spain could not have been expected to protect cane fields under the ordinary conditions, and if she furnished protection for the bateyes, mills, machinery, buildings, etc., this was as much as she could have been justly called upon to do under all the circumstances, and unless there were other and special circumstances shown, indicating specific negligence, there could be no recovery for the fields of cane destroyed by the insurgents.

There being nothing shown in this case which in the judgment of the Commission would take it out of this general rule, the claimant was held not to be entitled to any award in its favor, and the claim was dismissed, Commissioners Maury and Chambers dissenting. It is to be understood, however, that so far as the record shows, the action of the Commission is only that it finds and holds that, the claimant is not entitled to any award.

CONCLUSION.

The cases digested above are of course only a small portion of the cases disposed of by the Commission, and have been selected as typical of the more important questions presented to and considered by the Commission, and repetition has been avoided, no two cases being the same, though some one question may have been considered in two, or even more, of the cases digested.

Of the 542 claims filed involving claims to the amount of over \$62,000,000, about 340 claims, aggregating about \$25,000,000, have disposed of, the total awards in which amount to about \$700,000, leaving about 200 claims, aggregating about \$37,000,000, yet pending, in a great many of which, however, much testimony has been taken.

At the last session of Congress a provision was inserted in the sundry civil bill, which became a law, requiring the claimants to make a deposit of cash by about June 1, 1907, to cover the anticipated cost of taking their own testimony, failing in which their claims should be dismissed. It is too soon to determine the effect of this provision, but it is causing much delay in the work of taking testimony, as the claimants are unwilling to proceed, if indeed they have any right to

proceed, until the deposit has been made, and as the law allows ninety days from the passage of the act (March 4, 1907) in which to make the deposit, a certain amount of temporary paralysis in the work naturally, if not necessarily, results. There is an impression, however, that a large percentage of the claimants will from various causes submit to a dismissal.

Confident that this report will be useful not only to the Department of Justice, but also to other departments of the Government, as well as to any tribunal which may hereafter be required to pass upon the same or similar questions, this report is

Respectfully submitted.

WM. E. FULLER,
Assistant Attorney-General.

EXHIBIT O.

EMPLOYEES DEPARTMENT OF JUSTICE—DEFENSE OF SUITS BEFORE SPANISH TREATY CLAIMS COMMISSION.

Name.	State.	Office.	Appointed.	Remarks.
Wm. E. Fuller.....	Iowa.....	Assistant Attorney-General.	Mar. 9, 1901	Resigned to take effect May 31, 1907.
Hannis Taylor.....	Alabama.....	Special counsel.....	Mar. 11, 1902	
Chas. F. Jones.....	Indiana.....	Assistant attorney....	Mar. 27, 1901	
Alex. Porter Morse..	District of Columbia.	.....do.....	.....do.....	Resigned Apr. 30, 1902.
William E. Rogers...	New Jersey.....	.....do.....	.....do.....	Resigned Feb. 28, 1902.
Michael O'Neill.....	Ohio.....	.....do.....	Feb. 26, 1902	
A. R. Thompson.....	Pennsylvania.....	.....do.....	.....do.....	
Charles D. Westcott.	.....do.....	.....do.....	.....do.....	
C. B. Witmer.....	.....do.....	.....do.....	May 1, 1902	Resigned July 1, 1903.
Silas W. De Witt....	New Jersey.....	.....do.....	Sept. 1, 1902	Died Nov. 10, 1904.
E. G. Mills.....	Wisconsin.....	.....do.....	Oct. 1, 1902	
John S. Durham.....	Pennsylvania.....	.....do.....	Nov. 8, 1902	Resigned May 31, 1905
Harry K. Daugherty.	.....do.....	.....do.....	July 1, 1903	
Emory S. Huston....	Iowa.....	.....do.....	July 10, 1903	
Adolph Blerck.....	New York.....	.....do.....	Feb. 5, 1904	Died Mar. 24, 1905.
Martin T. Baldwin...	Illinois.....	.....do.....	Nov. 14, 1904	Resigned Nov. 19, 1906.
Benjamin F. James..	Ohio.....	.....do.....	Mar. 30, 1905	Resigned April 15, 1907.
Samuel H. Spooner..	Indiana.....	.....do.....	Oct. 27, 1906	
Alex. W. Kent.....	District of Columbia.	Interpreter and assistant attorney.	Nov. 22, 1904	Resigned July 5, 1906.
D. C. Chambers.....	Alabama.....	Financial clerk.....	Mar. 1, 1903	
Madden Summers....	Tennessee.....	Special agent.....	Mar. 11, 1902	
S. F. Stewart.....	Illinois.....	Special examiner.....	Jan. 14, 1904	
Frank L. Joannini...	District of Columbia.	Interpreter.....	Apr. 15, 1901	Resigned Nov. 1, 1901.
E. W. Guyol.....	New Hampshire.	.....do.....	Mar. 19, 1902	Resigned Sept. 30, 1902.
A. Y. Casanova.....	Pennsylvania.....	.....do.....	Nov. 12, 1902	
Warren E. Harlan....	Ohio.....	.....do.....	Mar. 1, 1903	Resigned Aug. 1, 1904.
Ricardo Garcia.....	Cuba.....	.....do.....	Nov. 1, 1902	
Caesar A. Casanova.	Pennsylvania.....	.....do.....	Nov. 7, 1903	Resigned Mar. 1, 1905.
John F. Delgado....	Cuba.....	.....do.....	Sept. 1, 1902	Resigned July 1, 1903.
Thalia N. Cochran..	Iowa.....	Stenographer and typewriter.	Feb. 10, 1902	Resigned Oct. 9, 1905.
Wm. W. Fuller.....	.....do.....	.....do.....	Mar. 1, 1903	Assigned to this Department by Commission; resigned June 17, 1903.
Helen A. Stewart...	Ohio.....	.....do.....	Nov. 1, 1905	
Marjorie J. Westcott.	New York.....	.....do.....	May 9, 1905	
Martha Lane.....	Iowa.....	.....do.....	Mar. 1, 1904	Assigned to this Department by Commission.
William J. Reed.....	New Hampshire.	Messenger.....	Mar. 1, 1902	
John G. Hawes.....	New York.....	Copyist.....	Mar. 7, 1904	

APPENDIX A.

SPANISH TREATY CLAIMS COMMISSION.

HARRY S. McCANN
 against
THE UNITED STATES. } Case No. 30.

OPINION OF THE COMMISSION, DELIVERED MARCH 6, 1902.

Individual claims of citizens of one nation may arise against the government of another nation for redress of injuries to persons or property which such citizens may have sustained from such government or any of its agents.

But such individual claims do not arise in favor of the officers and seamen of a ship of war who receive, in the line of duty, injuries to their persons for which a foreign government is responsible. The claim against the foreign government is wholly national, and all injuries to such officers and seamen are merged in the national injury; and they can look only to their own government for such remuneration as it may choose to give to them.

A seaman injured by the explosion which destroyed the battle ship *Maine* in the harbor of Havana, Cuba, on February 15, 1898, had no individual claim against Spain, even if that Government was responsible to the United States for the explosion; and therefore such a seaman is not entitled to an award in his favor from the Spanish Treaty Claims Commission, organized by the act of Congress of March 2, 1901, to adjudicate all individual claims of citizens of the United States against Spain which the United States released to Spain and agreed to pay by the treaty of peace of December 10, 1898.

OPINION BY THE PRESIDENT OF THE COMMISSION, WILLIAM E. CHANDLER.

This case was argued on a demurrer to the petition. The claimant is a native-born citizen of the United States and was a seaman on board the United States battle ship *Maine* who received injuries by the explosion which destroyed that vessel in the harbor of Havana on February 15, 1898; and he asserts that the explosion and destruction of the *Maine* were directly caused by the wrongdoing and negligence of the Government of Spain, which, therefore, he avers was and is responsible to him for his injuries except so far as the United States has assumed the responsibility therefor by the treaty of peace of December 10, 1898, and he asks an award in his favor against the United States for \$10,000 damages.

The treaty of peace contains an agreement as follows:

ARTICLE VII.

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

The act of Congress of March 2, 1901, requires this Commission to receive, examine, and adjudicate all claims of citizens of the United States against Spain which the United States "agreed to adjudicate and settle by the seventh article of the treaty."

The demurrer to the petition filed by the Attorney-General specifies four causes of demurrer, only one of which is necessary to notice in this opinion, namely, that no liability ever existed on the part of Spain in favor of the claimant by reason of the alleged acts complained of in the petition.

The demurrer to the petition is sustained for the cause thus stated. The Commission is of the opinion that no individual claims in behalf of the naval officers and seamen who survived or the representatives of the naval officers and seamen who perished by the explosion of the United States battle ship *Maine* in the harbor of Havana on February 15, 1898, ever arose against the Spanish Government, even if that Government was responsible for the destruction of the battle ship; and consequently no such claims are to be paid by the United States under the seventh article of the treaty of peace, whereby the United States agreed to adjudicate and settle all individual claims of its own citizens against Spain.

Ordinarily, under international law, individual claims arise in behalf of the citizens of any country who receive injuries for which a foreign government is responsible. Such claims are property rights of the persons injured, and descend to their personal representatives and assignees. (Act of Congress of January 30, 1799, 1 Stats., 613; Rev. Stats., sec. 5335; *Comegys v. Vasse*, 1 Peters, 193.) The existence and validity of such claims does not depend upon their recognition and presentation by the government of the claimants, although such recognition and presentation are usually sought and accorded. (House Report No. 134; Forty-third Congress, second session, pp. 10, 27; Belgium, 30; Switzerland, 33; Austria, 70; France, 76; Ecuador, 98; The Netherlands, 102; Colombia, 103; Liberia, 117; Salvador, 118; Venezuela, 119; Sweden and Norway, 122; Germany, 124; Italy, 125; England, 192; Portugal, 194; Argentina, 196; Denmark, 201.)

But this ordinary rule recognizing individual claims does not apply to the officers and seamen on a national naval vessel or to the officers and soldiers of a national army. If they, while engaged in the per-

formance of their duties, receive injuries for which a foreign government is responsible, the claims which arise therefrom are wholly national, to be presented and prosecuted solely by the nation which the seamen and soldiers serve. When the nation has secured redress and remuneration it will make such donations to its naval and military servants as the circumstances seem to require; or it may do this even if it fails to obtain reparation from the offending nation.

But no individual claims arise in behalf of the individual sailors or soldiers. They have endured only the hardships the risk of which they consented to encounter. They are entitled to receive from their own government their lawful pay and pensions and such additional recognition of their services and bravery, losses and sufferings, as a wise and grateful people will always bestow upon the protectors and defenders of their national existence and honor. But they give up, while in their military service, the citizen's privilege of seeking, through an individual claim, recompense for wrongs done to him by a nation other than his own.

Public policy evidently forbids the recognition of any privilege of the officers and seamen on a war vessel or of the officers and soldiers of an army to acquire the right to make personal claims directly against a foreign government for injuries received in the course of their service. The principal object of the navy and army of a nation is to prepare for war and to wage war against other nations. It would be most inconvenient to allow individual claims to grow up in behalf of the seamen and soldiers of one nation against the government of another nation, and to be formulated, presented, and pressed by those seamen and soldiers as indefeasible personal rights.

If they can make such claims individually, they can individually negotiate concerning them, and they can settle them individually, each for such sum as he chooses to accept. Such a condition is utterly inconsistent with the nature of the function which the seamen and soldiers are employed to perform.

Only three cases can be supposed of the destruction of a ship where a foreign government can be held responsible for the destruction and the injury thereby resulting to officers and seamen on board:

I. Where the ship is destroyed during flagrant war.

II. Where the ship is destroyed as a clear act of war, although war has not otherwise begun.

III. Where the ship is destroyed not during flagrant war nor as a clear act of war, but through the enmity or negligence of persons for whose act or neglect their nation may fairly be held responsible.

In the first two cases it is admitted that any claim which may be made is national merely, and no individual claims arise in behalf of any person, whether he is a naval officer or sailor or is a civilian owner or employee on board.

In the last case, if the vessel is commercial and in private ownership, individual claims of the owners and the crew rise against the foreign power, but no national claim. If the vessel is a ship of war, there is a national claim, but not in addition separate individual claims of officers and seamen engaged in the public service on board. They can seek compensation only from and through their own government.

It is impossible to admit the notion that a war cruiser can circumnavigate the globe, visiting foreign countries on the way, with a possibility that the officers and seamen on board may accumulate individual claims against the various governments for alleged wrongs done to them in the ports of visitation, which claims are rights of action belonging to the officers and seamen and descending to their heirs. No idea that there are such individual claims in behalf of national seamen and soldiers seems ever to have been advocated until the present cases arose; and these do not appear to have been imagined to exist until after this treaty containing the broad language of its seventh section had been adopted. In all the cases in history, injuries to such persons, received in the line of duty, have been treated as creating national claims only; they have been referred to only as incidents of a national claim; indemnity has been asked in the name of their nation from the other nation; and all sums demanded and received from the offending nation have been treated as national property; and where payments have been made to individual sailors or soldiers or their families or representatives, they have been made as donations merely and never in recognition of rights or in satisfaction of individual claims.

The counsel for the claimants have been urged to cite cases decided by any tribunal, authorized to adjudicate individual claims only, where an individual claim of a national sailor or soldier against a foreign nation has been presented; and not one case is forthcoming.

In attempting to respond to this request that counsel for claimants would refer the Commission to decisions justifying the contention that national sailors and soldiers may acquire individual claims against a foreign government, cases have been named as follows:

McKeown's case (Moore, Int. Arb., 3311).

The *General Armstrong* case (Moore, Int. Arb., 1071).

The *Hatteras* officers (Moore, Int. Arb., 4651; 18 Stats., 245).

McKeown's case was where a British subject serving as a seaman on a war vessel of the United States was maltreated by his commanding officer, and he was properly held to have an individual claim against the United States, which was his employer. But the case has no bearing upon the present question where the employed person tries to set up an individual claim, not against his employing government, but against another government.

In the *General Armstrong* case the vessel was an American ship in private ownership, but in the war of 1812 had privateering letters against Great Britain, and was destroyed by British war ships in the Portuguese harbor of Fayal on September 27, 1814. Claims for damages done to the seamen of the *Armstrong* were presented by the United States against Portugal under an arbitration to determine whether Portugal had failed in her obligations of neutrality. But they were not claims of sailors on a man-of-war; and, moreover, they were not presented as individual claims, but as incidents of a national claim. They could not be individual claims against Portugal, separate from the national claim, for they were not even individual claims against Great Britain, which actually did the injuries complained of. There could not be individual claims against Portugal for injuries done by Great Britain which were not claims against Great Britain. A mere national claim arose against both Great Britain and Portugal.

The *Hatteras* officers made claim in the distribution of the Geneva award moneys for payment for their property on a war vessel of the United States destroyed by the Confederate cruiser *Alabama*. For such compensation they had no individual claims against the Confederate Government, because war was flagrant. They had no individual claims against Great Britain by reason of her neglect in letting the *Alabama* fit out in her ports. If it were to be held that they had, the anomaly would be presented of individual claims existing against a government whose mere negligence contributed to the wrong done and yet no individual claims existing against the government which actually did the wrong. They had no individual claims against the United States until Congress gave them by the act of June 23, 1874 (18 Stats., 245), which ordered that all claims should be allowed "directly resulting from damage caused by the so-called insurgent cruisers *Alabama* and *Florida* and their tenders and * * * by the so-called insurgent cruiser *Shenandoah* after her departure from Melbourne," and which also, by providing that no claim should be allowed "arising in favor of any person not entitled at the time of his loss to the protection of the United States in the premises," decided that claims should be allowed in favor of every person entitled to such protection, whether a citizen or naval officer or seaman of the United States or of any other nation on the globe except Great Britain. (Moore, Int. Arb., 4653.)

As the case of the *Hatteras* officers has been emphasized by counsel for the claimants, the statement should be repeated that prior to the above act of June 23, 1874, the *Hatteras* officers had no individual claims against the Confederacy or Great Britain or the United States. When that act passed they acquired claims against the United States because Congress could do what it liked with the Geneva award

moneys, and in explicit language gave some of them to the individual sufferers by the depredations of the inculpated cruisers, as later by the act of June 5, 1882 (22 Stats., 98), it gave the remaining moneys to the losers by captures made by the exculpated cruisers and to those shipowners who had paid war premiums for marine insurance on their vessels and cargoes which had not been molested, although England's liability for those cruisers had been explicitly negatived by the Geneva tribunal and the war-premium damages had been too remote for serious consideration by that tribunal.

In short, Congress did what it chose to do with the \$15,500,000 Geneva award moneys; and there were never any individual claims as distinct from national claims against Great Britain on account of her neglect to perform against the Confederacy and in favor of the United States her obligations as a professedly neutral nation.

It is not to be doubted that Congress in like manner might have directed the Spanish Treaty Claims Commission to allow sums of money to the survivors of the *Maine* disaster and to the families of the dead sailors. Such directions would have created individual claims against the United States which did not previously exist against either Spain or the United States; and it is equally true that some equivalent provision in the treaty might have created such claims against the United States. But such was not the language of the treaty or of the act of Congress giving power to this Commission. (See Senate Ex. Doc. No. 21, Forty-fourth Congress, second session, being the Alabama Claims Reports; *Hatteras* officers' claim, 117; Secretary of the Navy's claim, 120; Worth's claim, 35; Moore, Int. Arb., 4649.)

Nor do additional cases much dwelt upon by counsel for claimants demonstrate that individual claims of sailors and soldiers of one government can arise against another government. Governments frequently present specific demands on account of injuries to their sailors and soldiers, provided they happen when actual war is not going on, but they are never presented as individual claims existing independently of the national claim. This remark applies to the cases cited by counsel, as follows:

(1) The offer by England to pay indemnity for the injury to sailors on the *Chesapeake* captured by the British man-of-war *Leopard* in 1807. (3 Am. State Papers, passim 6-500.)

(2) The payment by Paraguay in 1857 of \$10,000, which was given to the family of the helmsman killed on the United States naval ship *Water Witch*. (Moore, Int. Arb., 1487.)

(3) The Japanese payments to the United States in 1863, some of which went to the seamen on the *Wyoming*. (Japanese indemnity treaty, October 22, 1864; act of Congress of February 22, 1883; 22 Stats., 421.)

(4) The payments to the United States which went to the sailors of the *Baltimore* injured in Chili in 1891. (Messages of the Presidents, vol. 9, pp. 185, 215, et seq.)

(5) The payments by the United States to France on account of the accidental killing of French seamen in Toulon Harbor May 1, 1834. (Act of June 28, 1834; 4 Stats., 701.)

(6) The indemnity paid by Japan for the killing of British sailors at Yedo in 1862. (U. S. Dipl. Cor., 1863, part 2, p. 989.)

(7) The indemnity paid by Japan for the killing, in 1868, of the officers and seamen of the French frigate *Venus* and the French corvette *Dupleix*. (U. S. Dipl. Cor., 1868, part 1, p. 698.)

(8) The payment made by China to England for the killing of Colonel Margery in 1875. (U. S. For. Rel., 1875, p. 310.)

In none of the foregoing cases is there anything to suggest that individual claims in behalf of naval officers and seamen for indemnity for injuries in the line of duty received from a foreign government could be acquired and pressed as claims existing independently of the national claim. But prompt and effective demands were made for redress for the national injury, and when reparation was made the seamen and their families were most liberally treated by their own government.

It is this practice of the nations, whose seamen and soldiers are injured wrongfully under circumstances which render a government responsible for the injuries, to demand quick and full reparation and indemnity as a national claim, which shows that the deprivation of a sailor or soldier of the privilege of acquiring and holding an individual claim does not do him any injustice. He has by his enlistment surrendered an inferior right and has gained a superior right. He has yielded the privilege of making any personal demand upon a foreign government for money indemnity for an injury to him for which that government is liable. He has acquired the privilege of having his personal injuries made an incident of his nation's claim against the government responsible for the wrong done to him, and he rests secure in the certainty that his government will recognize his injuries and recompense the wrong in full and liberal measure. His private grievance is merged in the wrong done to his nation and its flag, and all this is to his advantage and gain, and not to his loss, in any possible degree or under any conceivable circumstances.

Illustrations of the extent to which a national sailor or soldier, as an equivalent for the new and superior rights which he gains as a representative of his government everywhere he goes under the flag, surrenders the fundamental rights of a mere citizen—the right to flee from attack, the right of free motion and free speech, the right to assemble and to petition for redress of grievances—may be found in

the correspondence of the Secretary of the Navy with Rear-Admiral Case on February 16 and March 3, 1885, and with Rear-Admiral Steedman on February 18, 1885, published in the Army and Navy Register, of Washington, on February 21, February 28, and March 7, 1885. With such a surrender goes also the relinquishment of the right to acquire individual claims against foreign governments for recompense on account of injuries done to the sailor or soldier by the acts or neglects of such governments or their agents.

In announcing as the basis of the present decision the general proposition that wherever an individual injury to a sailor or soldier creates in whole or in part a national claim of his government against another nation any right to make a claim for indemnity on account of such personal injury is merged in such national claim and can not exist independently thereof, it is not the intention of the Commission to decide any extreme case that may be imagined; nor to say that a sailor or soldier may not have an independent individual claim by reason of a wrong done to him when not engaged in the line of his duty.

Nor does the Commission undertake to say that the United States has fully discharged its obligations to the survivors of the *Maine* catastrophe and to the families of the lamented dead. The sole decision is that in their behalf no individual claims have ever existed against Spain arising from that catastrophe, even if the Government of Spain could be held responsible therefor. The necessity of making a distinction between individual claims and national claims, between the claims of citizens and the claims of seamen and soldiers, grows out of the exact language of the treaty and the statute. The treaty can not now be altered. The statute can be enlarged according to the judgment and will of Congress.

An order will be entered as follows: *Ordered*, in the case of Harry S. McCann, No. 30, that the petition be dismissed, it being the judgment of the Commission that the claimant is not entitled to any award in his favor.

A similar order will be entered in case No. 31, of Catharine Burns, and case No. 428, of Alexander Lynch.

The above opinion was concurred in by Commissioners Diekema, Wood, and Maury. Commissioner Chambers dissented.

[In the above cases briefs were duly filed; and the questions were argued orally in Washington on December 18, 19, 20, and 21, 1901, for the United States by Assistant Attorney-General William E. Fuller and Assistant Attorneys A. P. Morse, William E. Rogers, Charles F. Jones, and Charles W. Russell, and for the claimants by Messrs. Charles Henry Butler, Clifford Walton, Benjamin Micou, W. W. Dudley, and Hilary A. Herbert.]

APPENDIX B.

CONCURRING OPINION OF MR. COMMISSIONER MAURY.

In view of the importance of this case, it has seemed proper to state the considerations which have weighed with me in reaching the conclusion to sustain the demurrer to the petition.

It appears from the petition, which is somewhat full, that the petitioner, McCann, is a citizen of the United States, and was such at the time of the occurrences therein stated; that in January, 1889, he enlisted as a seaman in our service, and was doing duty in that character on the battle ship *Maine* when she was blown up and destroyed, on February 15, 1898, while on a friendly visit in the harbor of Havana; that he received serious injuries in consequence of the catastrophe, which entitle him to an award against the United States for the sum of \$10,000; that the destruction of the battle ship was directly caused by the wrongdoing and negligence of the Government of Spain; that said Government became liable to him for his injuries, but that the United States, by the treaty of December 10, 1898, has assumed said liability and released the Government of Spain therefrom, and that it has devolved on the United States to adjudicate, settle, and pay the petitioner his damages; wherefore he prays judgment, etc.

The United States demurred to the petition, and assigned with the demurrer the following causes:

1. That the Commission has no jurisdiction of the subject-matter stated in the petition.
2. That the petition does not contain facts sufficient to constitute a cause of action or entitle the claimant to an award against the defendant.
3. That no liability ever existed on the part of Spain in favor of the claimant by reason of the alleged acts complained of in the petition, and there is no liability on the part of the United States in favor of the claimant by reason of the treaty of peace between the United States and Spain of December 10, 1898.
4. That the alleged claim is not within the terms or the contemplation of the treaty of peace between the United States and the Kingdom of Spain of December 10, 1898, or the act of Congress of March 2, 1901.

The whole case turns on Article VII of the treaty of peace between the United States and Spain, of December 10, 1898, which is as follows:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late

insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

I shall not stop to consider whether the class of claims to which the present one belongs had taken the proper form to entitle it to be considered by the negotiators of the treaty, or whether the letter of the Secretary of State of July 30, 1898, may be properly weighed for the purpose of controlling the general language of the article, but shall confine myself to two conclusions, either of which, if sound, is decisive of this case.

I am of opinion that the existence of these supposed *Maine* claims would be repugnant to the fundamental conception of the treaty of peace, and, for that reason, that they are not included in the sweeping language of Article VII, upon an established rule of interpretation, and, consequently, are not within the jurisdiction of this Commission, which is restricted to claims for indemnity of our citizens against Spain relinquished to that power and assumed by the United States by the treaty, and can not, in the nature of things, extend to claims which, if ever operative, *ceased to exist in any form by the mere fact of the treaty.*

If, on the other hand, the treaty of peace had no such effect on the supposed claims, then I am of opinion that this Commission has no jurisdiction of this case, because the supposed claims *never had any existence at all.*

The first conclusion rests on the established fact that the destruction of the battle ship *Maine* formed part of the cause or causes of the war, it having been singled out for its atrocity as the culmination of the "abhorrent conditions" in Cuba for the removal of which hostilities were declared against Spain by the joint resolution of April 20, 1898 (30 Stat., p. 738), recognized as the initial point of the war by the act of April 25, 1898 (30 Stat., 364.)

No one acquainted with the state of the public mind of this country after that catastrophe, and after the finding of our naval court of inquiry that "the *Maine* was destroyed by the explosion of a submarine mine," the responsibility for which could not be fixed "upon any person or persons," from inability to obtain evidence, can doubt that the occurrence was a potent cause in bringing on the war, which we must notice as a part of the history of the times; as must be done, for example, whenever a question arises as to the grounds on which war was declared by Congress against Great Britain on June 18, 1812, the declaration being silent as to such grounds. (2 Stat., 755.)

Spain was profoundly stirred and incensed by her arraignment at the bar of public opinion of Christendom by the press of the United States as criminally responsible, directly or indirectly, for the destruc-

tion of our battle ship "with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana."

The feeling thus aroused must have been greatly intensified by the report of the Committee on Foreign Relations of the United States Senate, recommending the passage of the joint resolution of April 20, 1898, which, "after all the careful and anxious deliberation which great duties and responsibilities impose upon the judgment and conscience," deliberately charges "that the destruction of the *Maine* was compassed either by the official act of the Spanish authorities (and the ascertainment of the particular person is not material), or was made possible by a negligence on their part so willing and gross as to be equivalent in culpability to positive criminal action." (S. Rep. No. 885, Fifty-fifth Congress, second session, p. vii.)

With the close of the war, the "abhorrent conditions" which caused it *completely disappeared*, leaving behind, however, rankling in the breast of Spain, the sting of the *Maine* accusation.

It was repugnant to the fundamental idea of the treaty of peace of December 10, 1898, that this single and only remaining source of irritation between the two nations should be kept open by repeated forensic contests, under Article VII of the treaty, over the question of the responsibility of Spain to individuals for the destruction of our battle ship, before an *ex parte* tribunal to be established by the United States, and in proceedings therein to which Spain could not be a party; and that, too, after our Government had refused to entertain repeated offers on the part of Spain to refer the question of her responsibility to "an impartial investigation by experts, whose decision she accepts in advance."

A treaty of peace, while it operates as other international conventions and agreements, has effects peculiar to itself, which may flow from the mere fact of the treaty, without any provision in the instrument to produce them.

As it concerns the good of all nations that war between any of them should cease, the law of nations takes care that the mere fact of an agreement for peace shall have the effect of burying in oblivion all causes and pretexts for the war, as the only way of preventing a resumption of hostilities on any of the old grounds; for, as Grotius says, a peace is not complete if it leave *any old grudge* behind, which might in time renew the war. (Bk. 3, ch. 20, sec. 17.)

Another authority tells us that the only peace recognized by international law is one that is *perpetual* and *eternal* and binds by necessary implication the parties to it "never to take up arms on account of the differences which occasioned the war, and for the future to look upon them as entirely at an end." (Burlamaqui, Law of Nature and of Nations, vol. 2, ch. 14, sec. 7.)

Or, as is pithily said by still another learned author:

A treaty of peace has the following effects with reference to acts done before the commencement of the war which it has terminated:

1. It puts an end to all pretensions and draws a veil over all quarrels out of which the war has arisen. It has set up a new order of things, which forms a fresh starting point, and behind which neither State may look. War, consequently, can not be renewed upon the same grounds. (Hall, Int. Law, sec. 200, p. 583, 4th ed., London, 1895.)^a

To the same effect are Wheaton (pt. 4, ch. 4, sec. 3), Halleck (vol. 1, ch. 9, sec. 10, 3d ed., London, 1893), Bluntschli (sec. 708), and Vattel (bk. 4, ch. 2, sec. 19).

If, now, the alleged claims set up by the individuals demanding indemnity for injuries resulting from the destruction of the battle ship *Maine* were not obliterated by the mere fact of the treaty of peace, but are recognized by the treaty and included among the claims for indemnity to be adjudicated and settled by the United States, we have this extraordinary condition of things: That the treaty, on the one hand, buries in oblivion the charges and suspicions against the Government of Spain in connection with the destruction of the battle ship, and, on the other hand, requires an adjudication of individual claims growing out of that occurrence, which adjudication can not possibly be had without renewing charges and reviving animosities that have been fought over by the two countries and that can not be renewed and revived without threatening a renewal of the war on one of its original grounds.

It seems incredible that Spain should have agreed to a peace with the understanding that a court or commission to be established by the United States to adjudicate claims under the treaty should have jurisdiction in controversies between the United States and its citizens to inquire into and decide the tremendous question of Spain's guilt or liability in connection with the destruction of the *Maine*.

^a The importance of the question seems to justify the following additional citations:

Enfin, il faut remarquer que tout traité de paix est par lui-même perpétuel, et, pour parler ainsi, éternel de sa nature; c'est-à-dire, que l'on est censé de part et d'autre être convenue de ne prendre jamais plus les armes au sujet des démêlés qui avaient allumé la guerre, et de les tenir désormais pour entièrement terminer. (Burlamaqui, Droit de la Nature et des Gens, Tome 2, Quatrième Partie, Chapitre XIV, sec. 7.)

La paix diffère de l'armistice, principalement en ce qu'elle est stipulée pour toujours, et c'est dans ce sens qu'on l'appelle un traité éternel (pactum aeternum). (Klüber, Droit des Gens, Tome 2, sec. 322.)

A proprement parler, tout ce qui a donné lieu à la guerre devrait être décidé par la paix, ainsi que ce qui, discuté dans le cours de la guerre, pourrait laisser un germe de nouvelles mésintelligences que la paix doit couper si on ne veut pas qu'elle soit plâtrée. (Martens, Précis du Droit des Gens, Tome 2, sec. 333.)

La paix termine d'une manière définitive les différends internationaux; autrement elle ne serait qu'un armistice. En conséquence, les contestations qui ont été la cause ou le prétexte de la guerre, sont considérées comme définitivement réglées. (Hefter, Le Droit Int. de l'Europe, traduit par Jules Bergson, Paris, 1873, troisième édition.)

In my judgment, Spain never contemplated confiding the keeping and protection of her national honor to an exclusively domestic tribunal to be created by our Government without even the protection of a provision for her becoming a party to any controversy in which the subject to be investigated should involve her honor. Having, as she says in her overture for peace of July 22, 1898 (S. Doc. No. 62, Pt. 1, 55th Congress, 3d session, p. 272), resigned herself to a hopeless war with the United States for the "one object" of vindicating "her prestige, her honor, her name," Spain would, I apprehend, have perished by the sword rather than make peace on any such terms.

That the Spanish commissioners had no idea that any claim whatever in connection with the destruction of the battle ship *Maine* was left open by the article first agreed upon as Article VI, and afterwards numbered VII, with an additional paragraph binding the United States to "adjudicate and settle" the individual claims released to Spain, is, I think, shown by the prompt manner in which they met the supposed reflection on the honor of their country by the reference made to the *Maine* disaster in a résumé by the American commissioners of the intolerable conditions existing in Cuba when the war broke out (S. Doc. No. 62, Pt. 1, 55th Congress, 3d session, p. 209), and by President McKinley in his message of December 5, 1898, by proposing the insertion of an article in the treaty having for its object "the appointment of an international expert commission to be named with all imaginable guaranties to assure its impartiality in order that it might proceed to investigate the cause of the disaster and whether any responsibility were attachable to Spain, even were it through negligence."

The proposition to have the question of her connection with the destruction of the battle ship determined by an august international tribunal, with every guaranty for fairness, would have been absurd if it had been in the mind of Spain that the same question must necessarily be determined over again in the adjudication of claims of individuals seeking indemnity for injuries sustained in the *Maine* disaster, by suit in an *ex parte* court constituted by the United States, in which Spain could not be a litigant, and with a possibility of conflicting determinations.

Spain's proposition was rejected by the American commissioners on the ground "*that they considered the case as closed*," by which, I apprehend, they must be understood to have meant that the negotiations then going forward were proceeding on the theory that every vestige of dispute, national or individual, growing out of the destruction of the *Maine* was to be buried in oblivion on the conclusion of the treaty.

Otherwise the reply of our commissioners would have involved an unpardonable indignity to Spain if they intended to say that the fact of the implied assumption by the United States of Spain's liability to

her citizens by the then Article VI, with its concurrent duty of making judicial investigations of some sort, had been already accepted as furnishing a satisfactory method for determining the class of cases involving the question of Spain's responsibility for the destruction of the *Maine* and the full equivalent of the proposed international tribunal.

Spain was in a tremor of resentment at the reflection cast on "the unstainable honor of the Spanish people" by the recent references to the *Maine* disaster, and claimed "the most sacred right which could not fail to be recognized as attaching to Spain, as it is vouchsafed to the most wretched of human beings," namely, "*the right of defending herself from an imputation which left her in so sorry a plight before the other nations.*" But, if we are to be influenced by the arguments for the claimants, the American commissioners were as insensible as statues to this passionate appeal for justice, supposing the *Maine* controversy was to be kept open.

Undoubtedly the Spanish commissioners allowed their sensibility to get the mastery of their judgment in supposing there was any purpose on the part of the United States to engage in the inconsistent occupations of making peace and keeping alive the embers of war, since the language used by our commissioners and by President McKinley was purely historical and without any view to making the incident to which it referred the ground for a demand on Spain.

Looking at the matter from the mistaken point of view, as it seems to me, of the Spanish commissioners and of the learned counsel for the claimants, the protest of Spain on the rejection of her proposition for an international tribunal was the voice of natural justice itself (S. Doc. No. 62, Pt. 1, 55th Congress, 3d session, p. 260), which this Government did heed, and was bound to heed as a responsible power, by replying that it "*considered the case (the Maine case) as closed,*" never to be reopened.

We find a direct analogy applicable to the point now under discussion in the well-settled rule of international law that peace necessarily involves amnesty and pardon of all acts of treason committed by citizens or subjects of the countries that were at war, and also of all claims or demands for damages by the citizens of either country against those of the other for acts committed during the war. The reason why the veil of oblivion is thrown over all such matters is that to allow them to be carried into the civil or criminal courts would, as Bluntschli says, *cause continual apprehension that war, with all its horrors, would be renewed; because behind every person pursued civilly or criminally would always be found the country for which he had fought.* (Bluntschli, sec. 708-710; Calvo, Droit Int., t. 5, sec. 31-37, p. 370.) The applicability of these remarks to the *Maine* cases is self-evident.

But it is urged that these alleged claims must be considered and passed upon by this Commission, because the United States has expressly agreed by Article VII of the treaty to "adjudicate and settle" claims for indemnity of its citizens against Spain "*of every kind*" that "may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty," and by act of Congress has made it the duty of the Commission, which is given jurisdiction for the purpose, "to receive, examine, and adjudicate all claims" which the United States agreed to adjudicate and settle by the seventh article of the treaty." * * * (See act March 2, 1901, U. S. Stat., vol. 31, 877.)

The general and sweeping language of the seventh article of the treaty is pressed upon our attention, but the argument seems to lose sight of the rule that the language of treaties, laws, and writings of all kinds must be taken in subordination to the manifest intent of the instrument to be expounded, for "it is not the words of the law, but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul," so that "it often happens that when you know the letter you know not the sense, *for sometimes the sense is more confined and contracted than the letter*, and sometimes it is more large and extensive." (*Eyston v. Studd*, Plowd., 465.)

The *necessary intent* of a treaty of peace being, as we have seen, to put an end to all pretensions, *and draw a veil over all quarrels*, out of which the war has arisen, and to set up *a new order of things, which forms a fresh starting point, behind which neither State may look* (Hall, *supra*), would it not subvert the fundamental intention of the treaty of peace with Spain to hold that it was the purpose of the parties that the whole question of Spain's responsibility for the destruction of the *Maine* should be reopened and litigated before an *ex parte* tribunal in controversies between the United States and its citizens? The repugnancy of such an idea to a condition of peace would, if adopted, *necessitate the conclusion that the intention of the contracting parties was not a permanent, stable peace*, but only an *armistice*, under which there might be a resumption of arms on the original grounds.

Clearly, then, the operation of the general words of the seventh article of the treaty must be restricted so as to exclude from their operation the class of claims to which the one in question belongs, in obedience to the rule above laid down, which is recognized by the Supreme Court of the United States in the following language:

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. (*United States v. Kirby*, 7 Wall., 482, 486, 487.)

These alleged *Maine* claims having been *completely extinguished* by the conjoint operation of the treaty of peace and the law of nations, Spain is not only discharged from liability for them but the United States *is debarred from assuming their payment* as claims once valid against Spain, if the foregoing reasoning is well founded. The question, being essentially international in character, can not be affected by the provision of the Constitution of the United States prohibiting the appropriation of private property for public use without just compensation; it being incompetent for one nation to change, by its municipal laws, the law of nations to the prejudice of another independent nation. On the contrary, the Supreme Court of the United States has held, in a case determined on great consideration, that international law, "in its widest and most comprehensive sense," is "part of our law" and "must be ascertained and administered by the courts of justice" as often as questions under it properly arise before them. (*Hilton v. Guyot*, 159 U. S., 113, 163.)

There is no room for doubt that the outrages committed on our merchant marine by Great Britain in enforcing her pretended right of impressment were consigned to oblivion by the treaty of peace concluded at Ghent; but I am not aware that any of the thousands of seamen who were the subjects of those outrages were ever recognized as having individual claims against Great Britain which our Government was bound to satisfy in consequence of having been instrumental in their extinction or in their relinquishment to Great Britain.

It is clear, therefore, that the United States is under no duty imposed by the Federal Constitution to investigate the question of Spain's liability for the destruction of the *Maine*.

After thwarting the repeated efforts of Spain to have the question of her responsibility settled by an international investigation, and after the reflection cast on the findings of her board of inquiry as to the cause of the destruction of the *Maine* by the Committee on Foreign Relations of the Senate, it would be at once a severe test of Spain's forbearance and a shock to the sense of justice of the Nations for the United States to reopen the question before a tribunal of its own selection.

Supposing, however, that the destruction of the *Maine* was not one of the causes of the war, and, therefore, that the claims in question, if they exist at all, were not condoned or consigned to oblivion by the mere fact of the treaty of peace, it remains to consider whether the responsibility attributed to the Government of Spain for the occurrence could have given rise to individual claims against that Govern-

ment for indemnity in consequence of death or injury suffered by officers and seamen attached to the vessel destroyed.

As is well known, the battle ship *Maine* was blown up, with frightful loss of life, lying at her moorings in the harbor of Havana while on a friendly visit there.

Her mission was to represent the power and majesty of the Government of the United States and to give assurance of protection to the persons and property of citizens of the United States against the possible consequences of the disturbed conditions then existing in the island of Cuba, for the repression of which the local authorities were not completely adequate.

As such representative she was clothed with a distinct personality, in which all the parts of her organism, animate and inanimate, were lost and merged, having no existence except as members of the complex whole, the battle ship.

According to Calvo, the analogy is complete between the commander of a ship of war, in foreign territorial waters, and the officers and crew under him, and an ambassador at a foreign court, with his official and unofficial retinue around him. (*Droit Int.*, tome 3, sec. 1550.) In both cases there is enjoyment of complete extritoriality, and, in either, the slightest aggression on dignity or immunity is a national offense, or, as Martens has it, an insult to a power in the person of its representative.

To pursue the analogy, the completeness of the merger of the natural personality in the legal personality of an ambassador, makes it impossible that an indignity offered to an ambassador in the country to which he is accredited, can give rise to an individual claim on his part against the Government of such country. The precedents on the subject make this clear.

In the time of Queen Anne the Russian ambassador, near her court, was arrested under a *capias*, sued out by alleged creditors of his, and dragged from his carriage, and subjected to other indignities. The Czar pressed with great urgency for a "satisfaction proportioned to the enormity of the wrong committed against his dignity in the person of his representative."

Owing to a defect in the law, which Parliament immediately corrected, the guilty parties could not be brought to justice. So the Queen dispatched an ambassador extraordinary and plenipotentiary to make her excuses to the Czar and to express her feeling of chagrin and indignation at what had occurred.

The Czar granted the ambassador an audience under grand and impressive circumstances, and having heard the message of Her Britannic Majesty, replied that he would accept the statements therein as the satisfaction which was due him ("*comme la satisfaction même qui nous est due*"). It is most pregnant that this elaborate and con-

trite apology contained no offer of redress to the maltreated ambassador for what he had suffered as an individual—an omission which can hardly be explained if the arguments in support of the petitioner's claim are well founded.

A council of state having been called at the residence of the Grand Chancellor of the Empire to make the arrangements for carrying out the Czar's wishes, it was among other things decreed that Her Majesty the Queen be requested to address an appropriate letter to the misused ambassador, and to make good the expenses to which he had been put in consequence of what had occurred, as a personal satisfaction to which he was entitled; not, however, as a private claim of his against Her Britannic Majesty, *but as an act of grace from the Czar out of regard for the distinguished services which his ambassador had rendered, and in remembrance of the important services which had been rendered by his late father, Artemon Serge de Mathweof, prime minister and boyar, in the reign of the father and grandfather of His Majesty.*^a

There is no intimation in the full presentation of the case by Martens that the misused ambassador had an individual claim of any sort. (*Causes Célèbres*, 1, p. 47.) On the contrary, his relation to the indignity offered is treated throughout as strictly that of the representative of the person of his sovereign. Indeed, what he requested from the British Government the day after the occurrence was punishment of the offenders, and "*une satisfaction éclatante*," which it is impossible to suppose had reference to any individual claim of his own.

^a We give entire the account by Martens of all that occurred after the audience:

"L'audience finie, l'ambassadeur fut reconduit à son hôtel avec les mêmes cérémonies, et par ordre de l'Empereur traité pendant trois jours par M. de Soltikof avec la plus grande magnificence.

"Ce fut dans une conférence qui eut lieu le 9 Février chez le comte Golofkin, grand-chancelier de l'Empire, à laquelle assistèrent les autres ministres de l'Empereur, que cette affaire fut définitivement terminée à la satisfaction mutuelle. Il y fut arrêté:

"Que l'Empereur ordonnerait à M. de Mathweof, son ambassadeur à la Haye, d'instruire d'abord la Reine d'Angleterre de ce que Lord Withworth revêtu, tout exprès du caractère d'ambassadeur pour faire ses excuses à S. M. Impériale, s'était acquitté de sa commission; que S. M. déférant aux instances de la Reine avait bien voulu recevoir ses excuses faites en son nom comme satisfaction pour l'outrage fait à son ambassadeur, afin de lui prouver qu'il appréciait l'amitié de S. M. la Reine; que l'Empereur oublierait la conduite criminelle des auteurs de cet attentat et demandait leur grâce à S. M. britannique; que par égard aux services signalés que son ambassadeur lui avait rendus et en souvenir des services importants qu'avait rendus feu son père, Artemon Serge de Mathweof, premier ministre et boyare du règne du père et du grandpère de S. M., S. M. la Reine, à titre d'une satisfaction particulière due à M. Mathweof écrirait à cet ambassadeur une lettre analogue aux circonstances, et le dédommagerait des frais qu'il avait eus; que l'Empereur enfin ordonnerait à M. de Mathweof de demander sa lettre de créance, ainsi que le présent d'usage; et que lorsque tout ceci aurait eu lieu, l'Empereur en témoignerait sa satisfaction à S. M. la Reine d'Angleterre par une lettre autographe qui serait remise à Lord Withworth."¹ (*Causes Célèbres*, t. 1, pp. 73, 74.)

The principle derives illustration from the well-known case of Alexander McLeod, which grew out of the Canadian rebellion of 1838.

McLeod was arrested by the authorities of the State of New York on the charges of murder and arson alleged to have been committed by him, several years before, as one of an armed party who crossed over from Canada into New York and captured and destroyed the steamboat *Caroline* while moored to the American shore, it being alleged that the *Caroline* was employed as a transport for conveying recruits and munitions of war to the rebels who were occupying an island within British jurisdiction and threatening to make a descent on the mainland.

McLeod's arrest was promptly followed by a peremptory demand from the British Government for his release, on the ground that the act in which he was supposed to have participated was done by the command of that Government, and therefore could not subject him to personal liability of any sort.

The embarrassing predicament in which the United States found itself, owing to the refusal of the New York authorities to release McLeod before trial, was fortunately terminated by his acquittal and discharge, with which a matter that had seriously jeopardized the peace of the two countries was immediately dropped, but without any reference whatever to the losses and sufferings of McLeod; an omission which can only be accounted for on the supposition that his Government did not recognize the coexistence of a private claim on his part with the national demand which the Government had been urging against the United States. So far as the correspondence between the two Governments shows, McLeod, as an individual, is ignored throughout, the discussion being centered on him as the representative of the sovereignty of Great Britain.

Subsequently, McLeod brought a private claim against the United States for his arrest and imprisonment, before the commission established under the treaty of February 8, 1853, between Great Britain and the United States, and there being a difference in opinion between the commissioners it went to the umpire, who decided that the question in the case was essentially and exclusively "political" in character, and having been settled as such "*ought not now to be brought before this commission as a private claim.*" (Moore, Int. Arb., vol. 3, pp. 2424, 2425.)

Mr. Webster and Lord Ashburton having, after exchanging assurances and regrets, agreed to bury in oblivion the events in the case of the *Caroline*, which had come so near embroiling the two countries, could hardly have supposed that they had left the way open for McLeod and others to revive the national animosities by urging against either government private claims involving an examination into the very events which the two governments had solemnly agreed

to forget, a state of things analogous to that which would exist here if these demurrers were overruled. (Webster's Works, vol. 6, pp. 271-303.)

Before leaving the case of McLeod it is proper to ask how his claim against the United States was extinguished, if he ever had one. It was not released by treaty, for there was none, nor was it even referred to in the diplomatic notes that passed between Mr. Webster and Lord Ashburton, and certainly it could not have ceased to exist merely because the two Governments concluded to drop discussion of the political question growing out of his arrest and imprisonment. The solution of the matter would seem to be that McLeod had no private claim at all, and that his appearance before the commission with one was the result of an afterthought.

The principle is powerfully illustrated by the case of the *Chesapeake* and the *Leopard*.

The United States frigate *Chesapeake* having sailed from Norfolk, Va., for a European station, in June, 1807, had not gotten more than fairly out to sea when she was overhauled by the British frigate *Leopard*, and boarded by one of her officers, who claimed the right to examine the crew of the *Chesapeake* for deserters, and, if found, to take them from the ship. The captain of the *Chesapeake* refused to submit to this arrogant and lawless demand, whereupon the *Leopard* poured several broadsides into the *Chesapeake*, killing and wounding a number—the captain himself being among the wounded—and seriously injuring the ship, which, not being in fighting trim, was compelled to surrender and submit to the further humiliation of seeing several of her crew taken from her deck and carried off as prisoners and deserters under a British guard.

In demanding satisfaction from Great Britain for the outrage, Mr. Monroe, our minister at London, in his letter to Mr. Canning of September 7, 1807, uses this language: "You will, I am persuaded, be satisfied that in every light in which the subject can be seen the honor of my Government and of the whole nation has been greatly outraged by the aggression, and that it becomes the honor of His Majesty's Government to make a distinguished reparation for it." (Am. State Papers, vol. 3, Foreign Relations, p. 190.)

Throughout the diplomatic correspondence on the subject it is treated exclusively as a national political question, and no intimation is made that the United States expects England to provide for the sufferers on the *Chesapeake*, an omission which it is difficult to account for if the position taken by the claimants in these cases is correct.

Supposing, for the sake of argument merely, that Spain was responsible for the blowing up of the *Maine*, the analogy between that case and the case of the *Chesapeake* is so close that, if private claims arose against Spain in favor of the sufferers on the *Maine*, similar claims

must have arisen against Great Britain in the case of the *Chesapeake*; but, as we have seen, such claims, if they existed, were completely ignored by the United States in demanding satisfaction.

It was not until November, 1811, that this angry question was closed, but not with the "distinguished reparation" which its flagrancy demanded.

The British envoy, Mr. Forster, addressed a note to the Secretary of State, Mr. Monroe, in which he referred to His Majesty's prompt disavowal of the unauthorized act and to the removal from his command of the officer responsible for it, as a mark of His Majesty's disapprobation. He then submitted two propositions: To restore, as far as circumstances would permit, the men to the vessel from which they were taken, or to such seaport of the United States as that Government might name, and to offer to our Government "a suitable pecuniary provision for the sufferers in consequence of the attack on the *Chesapeake*, including the families of those seamen who unfortunately fell in the action and the wounded survivors."

In his reply Mr. Monroe says: "The President accedes to the *proposition* contained in your letter," and then adds, "The officer commanding the *Chesapeake*, now lying in the harbor of Boston, will be instructed to receive the men who are to be restored to that ship." (Whart., Int. Dig., vol. 3, sec. 315b.)

It thus appears that Mr. Monroe accepted *one proposition only*, that referring to the return of the seamen, and that he took no notice whatever of the other proposition to make "a suitable pecuniary provision for the sufferers" in consequence of the attack on the *Chesapeake*. This course of his was inexplicable and highly censurable on the supposition that these sufferers had private claims against the British Government and shows conclusively that no such claims were recognized by our Government.

But this is not all. When, in the years 1832-1834, the orphan children of Peter Shackerly, carpenter of the *Chesapeake*, who fell by the fire of the *Leopard*, importuned our Secretary of State at different times to assist them in securing the "suitable pecuniary provision" offered by the British Government *over twenty years before*, that officer, by direction of the President, *declined to do so*. (H. R. Ex. Doc. No. 418, Twenty-fifth Congress, second session.) In view of this action of the Secretary of State it becomes entirely immaterial whether our Government acquiesced in the offer of Great Britain or not.

Again, in 1820, these same orphan children petitioned Congress to extend to their case "the laws giving half-pay pensions in certain cases to the widows and orphans of persons slain on board public ships of war," and the Senate Committee on Naval Affairs, in reporting adversely on the petition, declined "to give an opinion how far *the rejected proffer of the British Government* to make provision for the

families of the persons slain on board the *Chesapeake* constituted a claim on our Government."

It is noticeable, furthermore, that this report states that the petitioners represented in their petition that the suitable pecuniary provision tendered by the British Government was rejected "*as being incompatible with the dignity of the Government.*" (S. Doc. No. 94, Sixteenth Congress, first session.)

It seems to me, therefore, very clear that the action of the Executive with reference to the Shackerly heirs necessitates the conclusion that it was the deliberate opinion of that Department that those heirs had no claim on Great Britain which our Government could countenance or assist.

I might here leave the subject, but before doing so prefer to notice one or two of the authorities chiefly relied on by the claimants, which I shall endeavor to show lend no support to the proposition they are cited to sustain, namely, that individual claims arose against Spain in consequence of loss of life and injuries caused by the blowing up of the battle ship *Maine* under the circumstances stated in the petition.

The case of the *Hatteras* "*claimants*," as they came to be called, does not appear to have relevancy to this discussion except on the original facts, leaving entirely out of view the relation in which the case afterwards stood with reference to the fund awarded by the Geneva tribunal.

The claimants were aboard the U. S. ship of war *Hatteras*, as part of her company, when she was sunk in action by the Confederate cruiser *Alabama*, off Galveston, and with her divers personal effects of the "*claimants*."

Did claims for the value of these lost effects thereby arise against Great Britain?

If that Government was liable in the premises, it was a liability consequential on her failure to fulfill her obligations as a neutral power to the United States as a belligerent power, an offense against the United States which was entirely national and political in character, because it had enormously increased the burdens and embarrassments of the United States in the prosecution of a great war. The Court of Claims aptly refer to it as an "*injury to the State as a whole.*" (*Gray, administrator, v. United States*, 21 C. Cls. R., 394.)

Is it not, then, a solecism to say that an individual citizen of the United States could, under any conceivable circumstances, have a claim against Great Britain growing out of this failure of hers to discharge her international duties as a neutral power?

The statement of such a case would seem to be its complete refutation.

But if these "*Alabama claims*" were, in their origin, *private claims* against Great Britain, I fail to see how the decision of the Supreme

Court in *Williams v. Heard* (140 U. S., 529), that Congress was under no obligation to pay any of these claims out of the Geneva fund awarded for their payment, is reconcilable with the constitutional prohibition against the public appropriation of private property without just compensation. But the difficulty disappears when we regard the fund as *national*, and, as such, the absolute property of the United States. In this view the Supreme Court and the British House of Lords entirely concur. (*Burnand v. Rodocanachi*, L. R. 7 Appeal Cases, 333.)

The case of the *Baltimore* will now be briefly considered.

One day, while the United States ship of war *Baltimore* was visiting the port of Valparaiso, some seamen of hers were wantonly and cruelly attacked and beaten in the streets of Valparaiso, without provocation, and under circumstances which showed that the assailants were instigated by hostility to the United States in the persons of those wearing its uniform.

The President of the United States treated the affair as an aggression upon the rights and dignity of the United States, precisely as if its minister or the flag itself had been the object of the insult.

Now, because the United States, in the exercise of its sovereign pleasure, chose to demand atonement from Chile for this national wrong and indignity in the shape of pecuniary indemnity to the seamen injured and to the families of the killed, the position is taken that, for some unaccountable reason, the United States in making the demand ceased to press for satisfaction in a "*primary way*" as an injured sovereign, but took the attitude of prosecuting in a "*secondary way*" the *private* claims of those interested in the required indemnity—a strange outcome of an affair which the President likened to an insult to our minister or to the flag by a foreign power. By a similar process we should arrive at the conclusion that the Geneva tribunal was established merely to entertain and decide the *private* claims of individuals who had suffered from the depredations of the Confederate cruisers.

But if the indemnity demanded was to be in satisfaction of a string of private claims, why did our Government require that it should be "proportionate to the gravity of *the affair*," instead of being proportionate to the gravity of the particular facts of the several cases? (U. S. For. Rel., 1892, p. 57.) Again, why was a sum in gross received and distributed without that regard to the circumstances of each case which is invariably observed by our Government in the urging of individual claims on foreign governments?

It seems beyond a doubt that our Government dealt with the gross sum paid by Chile with the same absolute authority that it exercised over the Geneva fund, and that Chile paid it with the same understanding, otherwise that Government would not have accompanied

the payment of the indemnity "with the request that it be distributed among the families of the two men killed and those who received personal injuries in the attack of the 16th of October last in Valparaiso." (Mr. Egan to Secretary Foster, U. S. For. Rel., 1892, p. 64.)

Other cases are relied on by the petitioners, but it is believed that they are satisfactorily disposed of by what has been said, and that comment on them would prolong this opinion unnecessarily.

In conclusion I do not think that a government negotiating for the settlement of a national political grievance which it has suffered at the hands of another government should be embarrassed by private claims of its own citizens against the latter government growing out of the subject of controversy between the two governments. In such cases the aggrieved citizen must look to his own government for any indemnity that government may see fit to give, as our citizens did who had sustained the losses which were known under the collective designation of "*Alabama* claims." What they received from their Government was a pure gratuity, although the amount of their losses was the measure of the indemnity claimed and secured by their Government from Great Britain.

The cases of *Catherine Burns v. The United States* (No. 31) and *Alexander Lynch v. The United States* (No. 428) stand upon substantially the same state of facts as the case considered in the above opinion, and, consequently, the demurrers in those cases should also be sustained.

APPENDIX C.

DISSENTING OPINION OF COMMISSIONER CHAMBERS.

All my colleagues having concurred in a decision that the petitioners have no claims against the United States, and the opinion just read being confined to that single proposition, I shall confine myself to it.

The act of Congress creating the Spanish Treaty Claims Commission was passed for the sole purpose of carrying into effect the following provisions of the treaty of peace between the United States and Spain, viz:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article. (Article VII, treaty of peace, December 10, 1898.)

The act, after constituting the Commission, provides that its duty shall be—

to receive, examine, and adjudicate all claims of citizens of the United States against Spain, which the United States agreed to adjudicate and settle by the seventh article of the treaty concluded between the United States and Spain on the 10th day of December, A. D. 1898. It shall adjudicate said claims according to the merits of the several cases, the principles of equity and of international law. (Section 1, act of Congress, March 2, 1901.)

The material facts stated by the claimants and admitted by the defendant are:

In the McCann case, that he is a native-born citizen of the United States; that he was an enlisted seaman in the United States Navy, and as such was on board the battle ship *Maine* when it was blown up February 15, 1898; that he sustained severe, lasting, and incurable injuries, permanently destroying his health and ability to work; that before, at the time of, and afterwards a condition of peace existed between Spain and the United States; that the battle ship was on a friendly visit in the harbor of Habana at the time of the explosion, and that the explosion and injuries were either caused by or resulted from agencies for which Spain was responsible.

In the case of Burns the suit is brought in the name of the mother as surviving heir and next of kin. The deceased was corporal of marines on board the battle ship at the time of his death, which was caused by the explosion, and was a native-born citizen.

In the case of Lynch the petition is filed in the name of the brother as surviving heir and next of kin. Deceased was a coal passer, and was in discharge of his duties at the time of the explosion in which he was killed, and was a native-born citizen of the United States.

The question is, Did the claimants, who were citizens of the United States in the service of their Government as sailors at the time of the explosion of the battle ship *Maine*, lose their individual right to claim indemnity from the Spanish Government because of such service, it being admitted that the Spanish Government was responsible for the explosion?

A correct understanding of this question depends upon a clear presentation of the condition of things which existed at the moment that the damage inflicted by the destruction of the *Maine* was consummated. The simplest principles of analysis divide the damage resulting from the act into two distinct parts:

First. There was the direct damage done to the Nation by the destruction of national property, such as the ship itself and its armament, and the indirect damage resulting from the indignity offered to a friendly State. If no war had ensued, if no treaty of peace had ever been made, the gross sum accruing to the United States as damages for property and insulted dignity vested in its corporate person would have belonged to the National Treasury separate and apart from the claims of private individuals.

Second. If no war had ensued, if no treaty of peace had been made, the Government of the United States would have owed it, as a plain duty under international law, to the survivors of that disaster, or to the families of such as were dead, the collection from the Government of Spain of reasonable compensation for such injuries inflicted in time of peace in the waters of a friendly State.

Having thus separated the distinctly national claims—that it, the claims of the Government exclusively independent of the claims for injuries to individuals—from those that accrue to the sailors as individuals, and such national claims not being involved in these cases, I lay down the following propositions:

A sailor neither forfeits nor waives any of his individual rights as a citizen, except such as conflict with the loyal, effective discharge of his duties as a sailor; that he assumes no risks that result from forces wrongfully put into operation by the culpable negligence or acts of a foreign government; that he has the same right any other citizen has to claim indemnity for wrongs done by foreign governments in time of peace.

It is important to remember that the relinquishment by the United States of all liability on the part of Spain was made without consulting with or asking the consent of the claimants. This was done under the doctrine that the sovereignty of a government over its citizens extends over the claims; that a citizen can do nothing with his own, is powerless and voiceless as an individual where foreign interests are involved, and unless his claim is adopted by his government, thereby nationalizing it, he is without remedy.

According to this doctrine a claim for indemnity by a citizen against a foreign government is inseparably connected with and can not be divorced from the national claim. There can be a national claim without individual interest or connection, but the individual necessarily involves the national character. The affront is to the nation while the actual loss or physical injury is to the citizen. The amount of damages which the offended nation claims against the offending nation depends upon the character and extent of the injuries done to the individual, but the recovery itself is in the name of the nation. The foreign government asks no acknowledgment, requires no acquittance from the injured citizen. The two nations have dealt as principals.

But to whom does the money, when collected, really belong? There is no statutory law of general or specific application under which a citizen of the United States can demand money so collected and held by the Government. The moral obligation exists, however, and the citizen is as safe under its protection as if a statute compelled the delivery of the indemnity to him. The history of our Government does not disclose a single instance where the Government has failed or refused to give over to its aggrieved citizens all that it has collected on account of indemnity claims against a foreign government.

The only modification of the doctrine that the claims of individual citizens against the foreign government are merged in the national claim is in the case of those governments that have opened their domestic courts to the foreign claimants. Spain has not done this, and therefore the modification can not apply in these cases. The old doctrine remains in force, and hence any recovery, whether in money or property, would constitute a fund which the United States could, in the exercise of brutal power, retain in its Treasury. But the Government has always acted as a faithful trustee for the citizen, and the distribution of the indemnity has always been made, not as a gratuity or benefaction, as is claimed, but as an act of justice to the rightful owner.

Can there be any difference in the status of a soldier citizen, in time of peace, and a mere civilian as to injuries done by a foreign government, so far as the obligation, moral or legal, is concerned, of his own government to distribute the indemnity? That there can be none is

made all the clearer to my mind by the fact that in all cases, without exception, where moneys have been voluntarily paid by one government to another on account of injuries done to its citizens, whether private individuals, sailors, soldiers, or official representatives abroad, or where moneys have been paid upon demand, every dollar has been paid out by the receiving government to the private individuals, sailors, soldiers, or representatives who actually sustained the injuries.

Counsel have discussed a number of cases bearing upon the question at issue and cited many others, but it is necessary in this connection to review only a few of those in which indemnity has been demanded, or accepted without demand, by the nation of the injured citizen to show that equal consideration and uniform justice have been extended to all classes of citizens without distinction. The fact that no government has ever demanded compensation or indemnity in any form for the killing of its sailors or soldiers when they have been attacked by a declared enemy in actual war removes that subject from the field of discussion, as it has no bearing upon the present cases.

The case of the *Water Witch*, referred to in briefs of counsel, is in point as showing that, while the indemnity was demanded and collected by the United States, the principle of trusteeship was fully recognized by the Government throughout the transaction. The Government sent its naval vessel, the *Water Witch*, on a surveying expedition, under an agreement with the Brazilian and Argentine Governments. The ship went beyond the waters of Brazil, and after proceeding a few miles in the waters separating Argentina and Paraguay was fired on from a Paraguayan fort. The fire was returned and kept up for some minutes. Besides doing other, but slight, damage, a shot from the fort mortally wounded the helmsman of the *Water Witch*. Paraguay had forbidden foreign war vessels to enter its waters, a fact known to the commander of the ship, but he claimed the right to navigate the channel of a boundary river, even though in doing so it took him nearer the forbidden country. The helmsman was "in the line of duty," and was employed at the instant of his injury in the service of the United States Navy, but this fact did not stop the Government from demanding indemnity. The United States collected from the Government of Paraguay \$10,000 and turned it over to the family of the injured seaman. (See Moore on International Arbitrations, vol. 2, p. 1487; also report Secretary of Navy, December 2, 1859.)

To the same effect is the Huesken case. He was assassinated while in the diplomatic service of the United States in Japan. The United States made a twofold demand, one being that the murderers be brought to punishment and the other for pecuniary reparation. The sum of \$10,000 was paid and turned over to the mother of the murdered man. That this was not a gratuity on the part of our Government is amply shown by the correspondence in the case. The min-

ister of the United States, under the instructions of Secretary Seward, based the demand for compensation upon the rights of the widowed mother, "who, by his death, had been deprived of her sole means of support." The demand of the minister was expressed in this unequivocal language: "That they (Japanese Government) should pay her a sum sufficient for her support, either in annual payments or in a sum sufficient to purchase a life annuity equal in amount to the income she received from her late son." (See message and diplomatic correspondence for 1862, pp. 804-807.)

Only one other case need be noticed, that of the *Baltimore*, which is of special importance and application because of its recent occurrence and the thoroughness with which it was investigated and discussed by the authorities at the time.

The *Baltimore* was at anchor in the harbor of Valparaiso and a number of her sailors were on shore leave in uniform and unarmed. They were in different parts of the city when they were attacked by armed men nearly simultaneously. One petty officer was killed instantly, and several seamen dangerously wounded, one of whom died soon after. A board of officers of the *Baltimore* investigated the affair and reported that the assaults were unprovoked and that some of the police of the place took part in the assault. Some of our sailors were arrested, and while being taken to prison were cruelly beaten.

Secretary Blaine promptly demanded a "suitable apology" and "adequate reparation." While he based his imperative demand upon the ground that the origin of the assault was in the hostility of the Chileans to the United States and was aimed at the uniform which the sailors wore perhaps more than at their persons, he clearly had in contemplation the affair itself, "in which two American seamen were killed and sixteen others seriously wounded, while only one Chilcan was seriously hurt." (Foreign Relations, 1891, p. 307.)

The matter was not closed until the great Secretary had passed away, but negotiations were pressed with vigor by his successors in office, and President Harrison gave more consideration to the matter than any similar question has received from so high a quarter.

Secretary Foster (Foreign Relations, 1892, page 57) renews the demand for "indemnity to the relatives of the seamen killed, and to the men who survived injuries while wearing the uniform of the United States," and insists that it "shall be proportionate to the gravity of the affair." But it is when President Harrison takes personal control of the problem that a true comprehension of the nature of the claims is gathered. In his special message of January 25, 1892, to Congress (see Richardson's Messages and Papers of the Presidents, vol. 9, pp. 215-226) he treats the subject exhaustively, and forwards to Congress all the correspondence and evidence.

This message is perhaps the most perfect statement in our diplomatic history of the international questions involved in a claim by one government against another growing out of injuries done to the sailors or soldiers of one nation while on a friendly visit to another, and establishes with a clearness never before so ably elucidated the dual character of what has been erroneously treated as purely national, to the exclusion of any individual participation in its results. All through the discussion, bringing to bear upon its many phases the great store of legal wisdom which made him conspicuous among many Presidents noted for legal ability, he keeps plainly in view the purely national demand for insult to the uniform and the demand for reparation on behalf of the individual. One in the right hand, the other in the left, but uniting in the body of the nation. An apology to the nation, indemnity to the individual. The purely *national phase* of the claim would have left the sailors unprotected and deprived them of all individual compensation. The collection and payment of the indemnity to the injured sailors or their personal representatives, exactly as the Government had so often done in other instances for private citizens, is a natural sequence of President Harrison's reasoning. He never sanctioned the doctrine that the individual sufferers, though sailors, should lose their just claims to indemnity because the claim in its largest sense involved national elements. As a matter of fact as well as of law the \$75,000 was paid by the Government of Chile to our Government for distribution "among the families of the two men killed and those who received personal injuries in the attack of the 16th of October last in Valparaiso." (Foreign Relations, 1892, p. 64.)

When the money reached Washington it was not even deposited in the Treasury, but was by the Secretary of the Navy distributed to the rightful owners—sailors who had been injured and to the survivors of those killed.

In the message of President Harrison there are many expressions which shed light upon this question, but I will quote only one or two. He says:

If the dignity as well as the prestige and the influence of the United States are not to be wholly sacrificed, we must protect those who in foreign ports display the flag or wear the colors of this Government against insult, brutality, and death inflicted in resentment of the acts of their Government and not for any fault of their own.

Again, when referring to his interest in the peace and development of South American Republics, he says:

It must, however, be understood that this Government, while exercising the utmost forbearance toward weaker powers, will extend its strong and adequate protection to its citizens, to its *officers*, and to its *humblest sailor* when made the victims of wantonness and cruelty in resentment, not of their personal misconduct, but of the official acts of their Government.

It is a singular coincidence, but of far-reaching significance, that the President in closing his message should have alluded in the succeeding paragraph to the one last quoted, to the claim of an unnaturalized foreigner, an Irishman, and probably a British subject, who had suffered severe personal injuries in Valparaiso at the same time the sailors of the *Baltimore* were assaulted. This man was a fireman on the American steamer *Keweenaw*, which was undergoing repairs in the harbor at Valparaiso at that time. The President reports to Congress that he "directed the Attorney-General to cause the evidence of the officers and crew of that vessel to be taken upon its arrival in San Francisco, and that testimony is also herewith transmitted." And finally the President concludes his message with the statement that—

a claim for reparation has been made in behalf of this man, for while he was not a citizen of the United States, the doctrine long held by us as expressed in the Consular Regulations, is: "The principles which are maintained by this Government in regard to the protection, as distinguished from the relief, of seamen are well settled. It is held that the circumstance that the vessel is American is evidence that the seamen on board are such, and in every regularly documented merchant vessel the crew will find their protection in the flag that covers them."

It would seem that the President had chosen the opportunity afforded by his message, emphasizing the demand for an apology from Chile for the insult done to the "colors" of the Government and for indemnity to the killed and injured sailors, to present the claims of a sailor of a merchant vessel who had been similarly assaulted for the purpose of illustrating the doctrine that the unprovoked assaults upon the person of anyone entitled to the protection of our flag will receive exactly the same treatment, and that there is no difference in the character of the demand which will be made on behalf of this Government against the offending government, whether the claimants be soldiers, sailors, diplomatic representatives, or private individuals.

All have been treated exactly alike. Throughout the existence of the nation this has been the unvarying policy. Since the suggestion was first made that a citizen who dares to "wear the blue" has less rights to indemnity for wrongs suffered at the hands of a foreign government in time of peace than any other citizen would have for injuries inflicted under exactly similar conditions, I have "searched the records," and it affords me pleasure in this high relation to make record that I have found no authority to support the proposition.

It is said that the citizen when he enlists in the military service of his Government surrenders the rights of a private individual in exchange for a higher protection. But this proposition will not bear analysis, and is not true. The soldier or sailor is rendered much more helpless to defend himself in time of peace than the private individual. The soldier can not use his gun, even in personal defense, except upon the command to fire by an officer authorized to give the order.

A soldier may be shot down in the streets, helpless to defend his person, because the Government has sent him out without the means of defense.

In fact, a soldier in time of peace, while in the line of duty, is the most helpless of men when it comes to resisting a deadly attack, and if his life be lost in a street broil for which he is blameless he has no higher legal claim upon the Government than any other unoffending citizen. He, however, has the same right at law, and his heirs would, if he be killed, that the private individual has for redress against the community, and he has the same right of action against the man who made the assault. He may be killed in defenseless condition notwithstanding the imaginary protection of his uniform, without any legal obligation on the part of the Government to give his widow a pension. But it is urged that his livelihood is guaranteed, and in the end he has assurance against the miseries of old age, and for these he surrenders individuality and all the other inestimable blessings of freedom.

A workingman's rations, no more clothing than the service requires, a hard bed, a constant, unbreakable discipline, severe punishment for slight disobedience, court-martial and death for flagrant violation of army regulations—these are some of the advantages private soldiers and sailors get in exchange for the comforts of home, the pleasures of society, the liberties of movement, and freedom of speech enjoyed by the private citizen who elects not to enlist in the country's service. In what, then, does the higher protection consist? At the last, when the days of youth are gone, if he is wounded in battle and is permanently and totally disabled, a pension of \$12 per month is granted him, or, if he is killed in battle, the valor of a faithful soldier is gratefully remembered in the munificent provision of the Government for the widow and orphan children at the rate of \$12 per month to the wife and \$2 each to the children, which seems to constitute the sum and substance of the higher protection.

If a soldier has a right to sue and recover damages from the individual who wantonly and without provocation attacks him upon the highway and inflicts total disability upon him equal with the right enjoyed under similar conditions by any other citizen, upon what principle of morality or justice can he be shut off, in time of peace, from claiming damages for wrongs inflicted by a foreign government, its agents, or subjects, where such a right is not denied but freely granted to other individuals? The government of the injured individual in the case of the private citizen makes the claim on his behalf against the foreign government because it is a recognized principle of international law, which every self-respecting government asserts and enforces, that its citizens are entitled to full reparation under such conditions.

It is true that the Government makes the demand for reparation in its capacity of sovereign and not as a mere representative of private interest; but the Government can not and does not forget that the indemnity received, although it may be paid to it in its corporate person, and even covered into its Treasury, belongs of right to the individual who has sustained the damage, and in some honorable way passes it over to the persons entitled thereto. The court of Alabama claims, in the distribution of the Geneva fund, carried this principle to its extreme limit. That court even allowed the claims of unnaturalized foreigners who at the time the damages suffered by them were engaged in the commercial marine or whale fishery, giving as their reason for so doing none other than that they were persons whose claims arose at the time that they were under "the protection of the United States." (Moore on International Arbitrations, p. 4653.) •

It was upon this broad principle of equal rights and comprehensive justice to all citizens that the claims of officers of the United States Navy were allowed by that court the same as claims of private individuals.

Porter, J., in delivering an opinion of that court in a case involving the question as to who could be claimants, said: "It is clear to us that the Government had the right to prescribe the terms on which claimants should present their claims;" and he based this statement upon the ground that private claimants "were not strong enough to compel the payment of the money by Great Britain," thus recognizing the principle contended for herein that the Government makes the claim of its citizens, because of their weakness and inability to demand reparation from a powerful foreign government, its own. And the claim of the individual citizen thereby becomes elevated and clothed with all the paraphernalia of a national claim.

Of all its citizens, classify them into as many different grades as may be, the weakest in this regard are the private soldier and sailor serving in humble capacity "in the line of duty."

As an illustration of the injustice which would result to this most helpless class of citizens if they are denied a hearing by this Commission: At the very moment when the *Maine* was blown up there was lying at anchor only a few hundred feet away the *City of Washington*, a merchant vessel of the United States marine. Suppose that vessel, with its sailors, had been destroyed by the very same agency which it is admitted caused the explosion of the *Maine*. This Commission would present to the people of the United States and of the civilized world the anomalous aspect of investigating for the purpose of adjudicating, "according to the merits of the several cases and the principles of equity and of international law," the claims of all these private citizens who were injured or killed upon the merchant ship, while the claims of the equally unfortunate sailor citizens, whose injuries were

received or whose lives were sacrificed while "in the line of duty" at the same instant of time on the battle ship *Maine* are denied a hearing. To my mind no principle of law, divine or human, international or municipal, recognizes or could justify such an incongruous procedure.

It is as clear to my mind as the shining sun is to my physical sight that the high commissioners of our ever-generous Government at Paris in negotiating the treaty of peace never intended, when they put into that treaty the words "all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty," to exclude the claims of that class of our citizens entitled to its highest protection and generosity while admitting all others. It is equally clear to me that the Congress of the United States, in the passage of the act to carry into effect the beneficent stipulations of the treaty in this regard, did not intend to exclude the claims of the sailors who went down to a watery grave on that ever-memorable occasion, now all the more so because, as the case is presented to the court, it is admitted that the explosion of the *Maine* was caused either by the act of the Spanish Government or through agencies for which it was responsible.

In the cases at bar the United States Government has released Spain of all liability for injuries which it is admitted Spain was responsible for, and has agreed on its part to adjudicate and settle all claims of every kind for indemnity that arose in behalf of its citizens for such wrongs between certain dates. Between those dates it is claimed that many of our citizens were injured and many killed; some in peaceful avocation on shore in Cuba, others "in the line of duty" on the battle ship in a Cuban harbor; some in civilian habit, others in soldiers' garb; some while engaged in personal, gainful pursuits, others while serving their Government in time of peace, prepared to sacrifice their lives in its behalf in time of war. Some were shot, others beaten; still others blown into eternity, while quietly asleep on shipboard, in the vain dream that they were safe, as the guests of a friendly nation.

Under these conditions I fail to perceive that there is any difference between one class of citizens and another, and can draw no distinction. Without classification they are all entitled to exactly the same consideration, and I can not believe that the Government of the United States, under the exercise of its sovereignty over its citizens, in the arrangement of the terms of peace with a vanquished enemy, would scrupulously provide for the claims of naturalized foreigners, who may have sought American citizenship for no other purpose than to secure the protection of its flag, and at the same time ruthlessly disregard and fail to provide for reasonable indemnity to

other citizens native born, whose patriotism had led them to enlist in its service and to risk their lives in its defense in time of war.

According to my view these are some of those individual claims of citizens of the United States against Spain which were relinquished to Spain and which the United States bound itself by the treaty of peace of December 10, 1898, to adjudicate and settle, and therefore the demurrers should have been overruled and the claims investigated and adjudicated on their merits by the Commission. This being my opinion, I am constrained to dissent from the decision of my colleagues.

APPENDIX D.

[Opinion No. 33.]

SPANISH TREATY CLAIMS COMMISSION.

RITA L. RUIZ ET AL.	} No. 112.
v.	
THE UNITED STATES.	

OPINION OF THE COMMISSION.

Commissioner CHAMBERS: The case is submitted upon petition, answer, amendment to the answer, and demurrer to amendment.

The petition filed by the widow and children of Ricardo de Ruiz contained, in conformity with the statute (act of March 3, 1901) and the rules of the Commission, all the necessary jurisdictional averments and predicated the right of claimants to sue upon the citizenship of the husband and father, who they allege was "a naturalized citizen of the United States, having been duly admitted as such by order of the Court of Common Pleas of the city and county of Philadelphia, in the State of Pennsylvania, on or about January 21, 1880, and having at all times maintained his allegiance to the Government of the United States."

To this petition defendant filed a general answer "denying each and every material allegation contained therein," reserving only "exceptions as to the question of the proper parties claimant," and later filed an amendment to the answer in substance as follows:

That the claimants ought not to maintain their action, because they assert their rights through the alleged citizenship of Ricardo de Ruiz, who, if he obtained naturalization at all, procured it by false and fraudulent representations, which consisted of his statement under oath to the court granting naturalization that he had resided in the United States for more than five years immediately preceding his application for citizenship, and the procuring of an affidavit to the same effect from a witness called by him, well knowing that the representations were false, because Ruiz arrived in the United States in May, 1876, without ever having been in the United States before, and that his application for naturalization having been made in January, 1880, it was impossible for him to have resided within the United States for five years next preceding his naturalization; that these

false representations were made for the purpose of inducing the court to, and the court did, act and rely thereon, and any papers of citizenship which may have been issued to Ruiz were so issued by the court because it relied upon the truth of these false and fraudulent representations, and that the court would not have issued to him any such papers conferring upon him the right of citizenship in the United States if it had not been thus deceived and imposed upon.

To the amended answer the claimants interposed a demurrer, as follows:

That the certificate of naturalization granted to the petitioner's decedent, Ricardo de Ruiz, by the Court of Common Pleas, No. 3, for the county of Philadelphia, in the State of Pennsylvania, and which the defendant seeks to impeach in the said amended answer, was a judgment of a court having competent jurisdiction, and it is not subject to impeachment or review by this Commission.

Argument was heard in pursuance of an order of the Commission which limited discussion "to the question of the conclusiveness of the certificate of naturalization," but the briefs and oral arguments of counsel on both sides assumed wide range and comprehended substantially all questions of fact and law involved in the case.

Counsel in all the cases where issue had been joined on the question of the conclusiveness of a naturalization certificate were invited, and quite a number, in addition to the able counsel employed in the case at bar, appeared in the oral argument and also filed briefs.

Notwithstanding the comprehensive range of the discussion, the Commission will restrict its decision, as near as possible, to the subject as stated in the order and which we consider to be squarely raised by the plaintiff's demurrer to the amendment to the answer.

Counsel have discussed at much length the question as to whether this Commission is a municipal court or an international tribunal, and appear to regard it as one of vital importance. The subject has been one of earnest argument on previous occasions, and as counsel are likely to continue its discussion on subsequent submissions it has been considered proper for the Commission to express an opinion now on the subject more definitely than it heretofore has. Reviewing the earlier arguments in connection with briefs submitted in the case at bar, it is interesting to note that counsel do not now hold to the exact position then taken. In these various discussions the Commission has received all the light which many eminent lawyers, arguing from the viewpoint of their clients' interests at different times and in different cases, have been able to throw upon the subject. When this question was first argued in the Teresa Joerg case, there was a consensus of opinion among counsel for claimants and defendant that the Commission, whatever its status in the domestic judiciary system, was nevertheless charged with the administration of international law. We were given by learned counsel for claimants the guiding

principle that the Commission "must consider the claims precisely as if they still constituted existing demands against the Government of Spain," and were told by other eminent counsel that the only question the Commission had to determine was the primary liability of Spain for indemnity, to be ascertained the same as an international tribunal would, had the United States not assumed their payment. There seemed to be no difference of opinion between counsel for claimants and the Government then as to these principles; but as the arguments progressed the attitude of counsel for claimants changed, and one of the most distinguished among them finally announced the doctrine that—

the original liability of Spain under international law is wholly immaterial in the controversy between the citizen and the United States—

and exhaustively argued

"that this is not an international tribunal, but purely a domestic one * * * provided by Congress for the trial and adjudication of judicial questions" and to decide "actions against the United States upon a contract," etc.

Since these propositions were announced all the counsel for claimants appear to have adopted them, and in the present case it is urged that this Commission, because it is a court of the United States and not an international tribunal, must not only give full faith and credit to the judgment of all other courts, State or Federal, but must in particular impute absolute verity and conclusiveness to a certificate of naturalization.

In a strictly technical sense the Commission is a national court, but in a broader sense is also international. In a very unique sense it is intimately related to both. If not distinctly incorporated into the Federal judiciary system, it will not be denied that the organic act (March 3, 1901) and the amendatory act (June 30, 1902) confer upon the Commission all the powers of a Federal court necessary to the investigation and *adjudication* of the claims arising under the treaty of December 10, 1898. Being the creature of an act of Congress, it is necessarily domestic in origin, and, being constituted exclusively of individuals of one nationality, it is certainly not international in composition, and its decisions affect only the government of its creation and composition. Back of the act of Congress which gave it life, however, we find its conception in a treaty between two nations, and thus it came into being as a domestic creature stamped with the features of internationality.

After a close study of the act and giving to its words the broad interpretation which the generous motive behind them authorizes, we find it impossible to separate the domestic character of the Commission as derived through its origin and composition from the international character imposed upon it by the treaty, and the precise words

of the act of Congress requiring the adjudication of claims "according to the principles of international law." Other domestic tribunals, such as prize courts, for illustration, administer international law in the absence of statutory mandate, because the nature of their business requires them to apply the law of nations; but this Commission is differentiated from all other municipal courts in that it is a domestic judicial tribunal definitely required, by the statute of its creation, to administer international law wherever that law may be fairly applied. The language of the statute, "It shall adjudicate said claims *according to the merits of the several cases, the principles of equity, and of international law,*" is a mandate to the Commission to apply the principles of international law in a spirit of equity to the merits of the cases whenever there are any such principles applicable. The exact status of the Commission, therefore, in jurisprudence, whether domestic or international, is by no means so important a question as the one of its powers. What it can do, rather than what we may call it, is the question of vital interest and consequence.

If, by the act of its creation, admittedly domestic, it is required to do the very things for which international tribunals are established, it must be assumed that the Commission, as an equity tribunal, will endeavor to apply the principles of international law to the several cases as they arise. Relief can not be expected, therefore, in a case that is without merits—the first essential stipulation of the statute—and a case can not be meritorious that is dishonest or founded upon fraud. A case may, however, develop merits and yet this tribunal can not rightly adjudicate the same, in the light of the treaty and the act of Congress, if it falls within the principles of international law, without applying them just as a mixed tribunal should do.

Congress in its wisdom apprehended and unquestionably appreciated the difficulties in the way of adjudicating the various classes of claims by a tribunal restricted in its operation to the settled rules of law, and consequently decided to clothe it with greater power and more discretion than are properly exercised by the ordinary courts of law. It was not alone because the Government had solemnly assumed, but because it desired to pay all the valid claims of its citizens against Spain, that Congress created a tribunal with equitable powers so elastic that no complexity of facts or circumstances could or should prevent it from rendering such an award as the merits of the claim, the principles of justice and of international law require. The purpose of Congress in enacting this beneficial statute could not be better expressed than in the impressive words of Chief Justice Waite in *Freylinghuysen v. Key* (110 U. S., 63):

No technical rules of pleading, as applied in municipal courts, ought ever to be allowed to stand in the way of the national power to do what is right under all circumstances.

Finally, on the question as to the character of this Commission, the argument that it is only a domestic tribunal limited in some unexplained way in its powers as compared with an international tribunal, because, under certain conditions, the Supreme Court can review a case pending before it is not a conclusive proposition. It will hardly be denied that the district courts of the United States are domestic tribunals, and yet Mr. Justice Story, in the case of the *Adeline* (9 Cranch, 244), speaking of district courts sitting as courts of prize, said:

In the prize courts, in an especial manner, the allegations, the briefs, and the proceedings are in general modeled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals inevitably impose. A court of prize is emphatically a court of nations, and it takes neither its character nor its rules from the mere municipal regulations of any country.

It is no answer to say that this was spoken with reference to a prize court, because a district court of the United States, when sitting in prize cases, is no less domestic in its creation and composition than when sitting in bankruptcy, and appeals lie to the Supreme Court from a court of prize, which Justice Story says is "emphatically a court of nations," under precisely the same conditions as from a court of bankruptcy. Here we see the Supreme Court calling a purely municipal court a "*court of nations*."

While we have never gone so far as to call this Commission a "court of nations," it is quite clear that we might do so, with the sanction of the Supreme Court, without in anywise affecting its municipal character. We have rather been inclined to adopt the view of the Court of Claims, as so well expressed by Judge Weldon in the case of *The Ship Rose v. The United States* (36 C. Cls. R., 290, 302). That was a case arising under the act of Congress of January 20, 1885, giving the Court of Claims jurisdiction to ascertain the claims of American citizens for spoliation committed by the French prior to the 31st of July, 1801, wherein it was provided that "they (the Court of Claims) shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same." The able jurist in that case said: "This court in making the investigation contemplated by the act of our jurisdiction is *sitting in the character of an international tribunal*."

Now, the act of this Commission's jurisdiction provides that "it shall adjudicate said claims (those provided for by the treaty) according to the merits of the several cases, the principles of equity and of international law," and the claims all arise out of alleged injury to the persons and property of people claiming American citizenship, by Spanish authorities and subjects, contrary to their rights under international law. This Commission, therefore, while in every essential a municipal judicial body, in making the investigations and adjudica-

tions "contemplated by the act of our jurisdiction *is sitting in the character of an international tribunal.*"

The issue presented by the pleadings in this case is distinct and definite. Claimants say that because their decedent was a naturalized citizen of the United States and came to his death by reason of his unlawful arrest and imprisonment and the cruel and inhuman treatment of the Spanish officials while in jail, they are entitled to recover damages in the sum of \$100,000.

The defendant disputes their right to recover anything, because claimants' decedent was never a citizen of the United States; and second, that the naturalization certificate upon which the citizenship of decedent is predicated was obtained by fraud.

Claimants meet this defense with the plea that a naturalization certificate can not be impeached or reviewed by this Commission, because it is a judgment of a competent court.

Primarily, therefore, the question for determination is: Did the court granting naturalization have jurisdiction? And, secondly, is a naturalization certificate conclusive, and does it close all inquiry into alleged false and fraudulent representation of material facts made to the court, and upon which, believing them to be true, the court granted naturalization?

Section 2165, United States Revised Statutes, expressly confers jurisdiction on circuit and district courts of the United States district and supreme courts of the Territories, and courts of record in any of the States having common-law jurisdiction, a seal, and a clerk, to grant naturalization certificates. It is not denied that the court of common pleas for the county of Philadelphia which issued the certificate of naturalization to Ruiz is a court of the State of Pennsylvania having common-law jurisdiction and a clerk and a seal, and therefore the jurisdiction to naturalize aliens had been conferred on it by Congress; so far, therefore, as the tribunal itself which granted the naturalization of Ruiz is concerned, there does not seem to be any question as to its power to grant naturalization to aliens.

Jurisdiction may be very briefly defined to be the power of a court to take up a case. Its power to pass upon the merits of that case is quite another thing. The right of a court to adjudicate concerning the subject-matter in a given case is its jurisdiction. In *Daniels v. Tearney* (102 U. S., 418), it was said, "Jurisdiction is only the right to hear and determine. The result of its exercise is the judgment of the court." Jurisdiction should, therefore, be distinguished from the exercise of jurisdiction, since it is the authority or power to consider and decide a case and not the decision a court may render therein that makes up jurisdiction. (See Am. & Eng. Enc. of Law, 2d ed., p. 1042; also *Decatur v. Paulding*, 14 Pet., 600; *Hagerman v. Sutton*, 91 Mo., 519.)

In *Reynolds v. Stockton* (140 U. S., 268), Mr. Justice Brewer, delivering the opinion of the court, adopted a definition of jurisdiction from *Munday v. Vail* (34 N. J. Law, 418), in which the learned judge said: "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue."

Applying this definition by the Supreme Court to the case under consideration, it can not be denied that the Pennsylvania court had cognizance of the class of cases to which the one it adjudged belongs, and therefore the first essential for jurisdiction was present. That the second requisite for jurisdiction existed in this case seems equally indisputable. The filing of the original declaration by the alien seeking naturalization is an acknowledgment on his part of the "right to adjudicate concerning the subject-matter" involved in his application. While it is true that he is the only party actually present in person in the court, it is no less true that by virtue of the act of Congress conferring jurisdiction upon certain courts to grant naturalization the United States may be considered as constructively present in the same sense that the "other party" is present in *ex parte* proceedings generally.

Neither is there any question that the third requisite for jurisdiction was met in the case now under consideration, as the only point to be decided by the court was whether certain facts were "made to appear to the satisfaction of the court" by the applicant Ruiz in accordance with the third clause of section 2165, *supra*. Admitting that the court had cognizance of the case and that the only party whose actual presence was necessary was properly before it, and that the essential facts required by statute were made to appear to the satisfaction of the court, it is very clear that its jurisdiction was complete, whether it granted or refused the application. "The jurisdiction of the district court in matters of naturalization does not depend upon facts stated, but is derived from the statutes of the United States. Whether the court will grant naturalization papers in a given case depends upon the facts; but it has jurisdiction over the matter even if the facts be insufficient for a favorable result to the application." (*United States v. Walsh*, 22 Fed. Rep., 644.) To similar effect is the decision in *re Bodek* (63 Fed. Rep., 813). The contention of the defendant that where a court entertains a naturalization proceeding and determines it adversely to the applicant on the ground, we may say, that certain facts had not been "made to appear to the satisfaction of the court," it was without jurisdiction to determine and hear it at all we do not think is sustained by the authorities.

The authorities cited by the Government in support of this contention refer to cases where the court exceeded the power conferred upon it by statute in making an entirely different decree from the kind it was empowered to render. In the cases cited there was no contention over the statutory jurisdiction of the court to render a decree. The point made on appeal was that the court was without jurisdiction because the decree it rendered was contrary to the provision of the statute. In the case of *Bigelow v. Forrest* (9 Wall., 351), for illustration, which the Government cites, a court decreed a sale of the property in fee simple when the statute only empowered it to decree a sale of a life interest; and in the case of *United States v. Walker* (109 U. S., 258), also relied upon by the defendant, the court made a decree directing the delivery of administered assets when it had authority only to decree the delivery of unadministered assets. It is not deemed necessary to refer in this connection to the other cases cited by defendant in support of this proposition as they are all of similar import. There is a clear distinction between this class of cases and naturalization cases, where the court is unquestionably authorized to make an order granting naturalization simply if certain facts "shall be made to appear to the satisfaction of the court."

It is the opinion of the Commission that the court which issued the naturalization certificate to Ruiz is one of competent jurisdiction; that its decision upon facts "made to appear to the satisfaction of the court" is conclusive that it exercised the jurisdiction conferred upon it by the statute, and its conclusion entered upon the record, whether we call it an order, decision, or judgment, is entitled to the same degree of faith and credit generally accorded to the judgments of courts exercising undisputed jurisdiction. But it remains to be considered whether such an order or judgment is conclusive upon and precludes inquiry into the facts which were *made* to appear to the satisfaction of the court rendering it, by another forum of competent jurisdiction to hear and determine a cause in a proceeding wherein that judgment is pleaded as a basis for equitable relief, and the defense interposed is that the court was deceived by false and fraudulent representations knowingly and intentionally made by claimant to grant the certificate of naturalization.

But it is urged by counsel for the Government that naturalization proceedings are special and of the same character as proceedings under the shipping commissioner's act, and applications to be admitted to practice as an attorney, which, although authorized by statute, are addressed solely to the discretion of the court; that they are noncontroversial, and being without adversary parties "it may well be doubted whether there is, in any proper sense, any judgment in such cases." In support of this view the case of *The United States v. Hill* (120 U. S., 169) is cited, which was an action to recover from the

clerk of a district court of the United States fees received by him in naturalization proceedings, under the statute requiring clerks to account for "all fees and emoluments of his office, of every name and character," etc. The Supreme Court, practically adopting the opinion of the circuit court for the district of Massachusetts, says, on page 177:

Referring then to the fee bill of February 26, 1853, as found in sections 823 et seq. of the Revised Statutes, the court proceeds: "Upon an examination of the statute it will be seen that it applies to taxable costs in all ordinary litigation, whether at law or in equity or admiralty, and undoubtedly governs the taxation in all such actions, suits, and proceedings, civil and criminal, *in personam* and *in rem*, in the courts of the United States. But it has not usually been considered, at least in this district, as applying to certain special and peculiar cases, of which the courts have jurisdiction, where only the party asking for the right or privilege is before the court and from the nature of the case no costs are taxable as in ordinary litigated suits. Of such a character are proceedings under the naturalization laws, under the shipping commissioners' act, and applications to be admitted to practice as an attorney. Thus Judge Shepley early refused to allow the clerk to tax costs by the fee bill on applications under the shipping commissioners' act of June 7, 1872 (17 Stat., 272; Rev. Stat., sec. 4544), for the money and effects of deceased seamen, deposited in the circuit court by the shipping commissioner."

From a careful perusal of the whole opinion in that case it will be observed that neither the circuit court nor the Supreme Court was discussing the question whether an order granting naturalization was or was not a judgment. The court was simply construing an act regarding fees of clerks, and held that the statute applied only to "taxable costs in all ordinary litigation," etc., * * * and not to apply to "certain special and peculiar cases, of which the courts have jurisdiction, where only the party asking for the right or privilege is before the court," such as "proceedings under the naturalization laws." If this decision is useful for any purpose in the case under consideration, it would be to show that naturalization proceedings are neither *in personam* nor *in rem*, without in anywise touching the question as to whether or not the determination of the court thereunder was a judgment at all. Reference is also made to certain opinions of Attorneys-General in which they appear to avoid calling the conclusion of courts upon naturalization proceedings a judgment, and the opinion of Attorney-General Akerman (13 Opinions Attorney-General, p. 376), in the case of Moses Stern, is particularly cited, in which he speaks of naturalization proceedings as *ex parte*. He says:

He was naturalized in the United States district court for Connecticut March 27, 1869. The record recites that he had resided constantly in the United States for more than five years. If this recitation were conclusive, his rights to protection under the treaty would be established. The record establishes the general fact of his naturalization and of his right to be recognized here as an American citizen in all domestic transactions.

But recitations in the record of matters of fact are binding only upon parties to the proceedings and their privies. The Government of the United States was no party

and stands in privity with no party to these proceedings, and it is not in the power of Mr. Stern, by erroneous recitations in *ex parte* proceedings, to conclude the Government as to matters of fact.

Here again it will be seen that the learned Attorney-General was not discussing the question as to whether the record which he says "establishes the general fact of his naturalization" was a judgment, but the question of parties holding that the United States not being, in his opinion, a party in *ex parte* proceedings, is not concluded by erroneous recitals of matters of fact. This conclusion, on the line of his reasoning, would have been the same if he had called the record which established the general fact of Mr. Stern's naturalization a judgment.

In the refinements of legal phraseology we may find some other word that suits us better than *judgment* by which to call the final determining act of a court in passing upon such proceedings—order, adjudication, decree, decision, conclusion—but the effect is just the same. The thing done and not the technical name one chooses to give it is of importance only. The validity and legality of an act done, whether by an officer or a tribunal, depends upon the jurisdiction over the subject-matter and the exercise of its delegated power by a judicial body in reaching a conclusion is, to all intents and purposes, a judgment, whether technically so called or not, and it is a matter of legal insignificance what other term or name is employed to express it. The authorities make no distinction between the orders of officers and the judgments of tribunals, where the exercise of jurisdiction is confided to their discretion, and they employ the same within the authority and power conferred. Neither do we find authorities to sustain the proposition that a judgment in uncontested proceedings, by default of confession, is excluded from the terms of Article IV, section 1, of the Constitution, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State" and of the act of Congress, Revised Statutes, section 905, which declares that such records and judicial proceedings, when properly authenticated, "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." The authorities appear to make no distinction whatever between different kinds of judgments. They are all entitled to the same faith and credit, whether entered by default, confession, or in a contested litigation, and may be impeached on the same grounds as other judgments are impeachable upon. (Freeman on Judgments, sec. 588; *Bunn v. Ahl*, 29 Pa. St., 387; 72 Am. Dec., 639; *Sipes v. Whitney*, 30 Ohio, 69; *Kingman v. Paulson*, 126 Ind., 507.) It is interesting to note in this connection that neither the Constitution nor the statute refers specifically to a judgment, and it is equally true that the acts of Congress

relating to naturalization and conferring jurisdiction upon certain courts never speak of a judgment, and yet the courts of the country, from the earliest decisions to the present time, in innumerable cases, have uniformly treated them as judgments. Undoubtedly the decision of a court of competent jurisdiction, to grant a naturalization certificate based upon facts made to appear to its satisfaction, is comprehended in the expression "public acts, records, and judicial proceedings," and must be a judgment.

In considering of their conclusiveness, therefore, upon this court, we will treat certificates of naturalization as judgments entitled to have such faith and credit given to them as by law or usage they have in the courts of the State where rendered, subject to the principles of international law as applied by courts charged (as this one) with the administration of the law of nations.

Counsel for claimants contend broadly that a judgment of naturalization is a judgment *in rem*, and for that reason is conclusive upon all the world as to the facts and things adjudged. Therefore, they argue, it is immaterial whether or not the judgment of naturalization is, as to Spain (in whose shoes the United States now stands), a foreign judgment, and that whether domestic or foreign it is equally conclusive in this tribunal, irrespective of the question as to whether it is administering municipal or international law. Admitting, however, that even a judgment *in rem* is not under all circumstances conclusive and may be collaterally attacked, not only for want of jurisdiction in the court that rendered it, but for some kinds of fraud, it is urged by claimants that the fraud alleged in the case at bar is not of the kind that would render the judgment subject to a collateral attack, because the fraud charged is not extrinsic.

Counsel for defendant deny that a certificate of naturalization is a judgment *in rem*, contending that at best it is only *quasi in rem*, but insist that in either aspect the proceedings which "made it appear to the satisfaction of the court" may be inquired into in a subsequent action based upon that judgment when it is alleged that it was procured by fraud.

Why counsel should distinguish a judgment of naturalization from a judgment *in rem* and call it a judgment *quasi in rem* does not clearly appear, for it is not pointed out in what respects the legal consequences of the one differ from the other. Being like a judgment *in rem*, similar attributes and consequences necessarily follow.

Where fraud in its procurement is the defense against the conclusiveness of a judgment, we fail to discover any difference between a judgment *in personam* and a judgment *in rem*. The same is true if want of jurisdiction is the defense. These, however, are the only defenses that can be made to judgments *in rem*, since they are conclusive in all other respects upon all the world. But judgments *in*

personam, being conclusive only as to parties and their privies, may be attacked by strangers upon any ground that would have been a valid defense in the original action.

The only difference, therefore, between the two classes of judgments when pleaded in a subsequent action is that the sources of impeachment are materially less restricted in the case of an *in personam* judgment than when the judgment is *in rem*. The one, however, enjoys no greater immunity than the other when founded in fraud. Law can not be "the perfection of human wisdom" if one may so debase its instrumentalities as to make it the servant of his fraudulent designs, and thereby secure for himself rights and privileges which would otherwise be denied him. The law that would make falsehood incontestable and fraud impregnable is not the law that makes and protects American citizenship.

In the administration of the laws of Congress the courts are called upon to perform few more important functions than the conversion of an alien into American citizenship, and it is not easy to conceive how they could be more ignobly employed than in conferring this boon upon men who intentionally and criminally induce their favorable action through false and fraudulent representations. Shall an alien who thus abuses the jurisdiction of one of our courts in *ex parte* proceedings be permitted, unchallenged, to make the judgment of naturalization, obtained through fraud and perjury, the basis of a suit for damages against the country of his nativity, and for that purpose to invoke the assistance of another judicial tribunal of the country upon which he committed the fraud? It is difficult to see how there can be but one answer to the question.

Admitting all that counsel have said and all the books say on the subject of estoppel by a former judgment, and even that "the doctrine of estoppels in judgments, instead of being odious, is one of the most conservative and salutary doctrines of the law" (Freeman on Judgments, sec. 247; *Gray v. Pingry*, 17 Vt., p. 419; 44 Am. Dec., 345), we can not be unmindful of the principle, underlying and safeguarding all judicial proceedings, that whatever is settled thereby must be the result of an investigation conducted under the most favorable rules that mankind have been able to devise for the exposure of falsehood and the ascertainment of truth. Estoppel has become a revered doctrine in our jurisprudence, not because it protects fraud, but prohibits a party from disputing the truth.

In *ex parte* proceedings the court necessarily acts upon a state of facts, and not infrequently upon constructions of law, presented alone by the petitioner, and the judgment rendered upon a one-sided presentation of the case is predicated largely upon the principle of truthfulness, honesty, and absence of fraud in the party invoking its jurisdiction. This is true in mandamus and injunction cases, but there

the adverse party is given a subsequent day in court, when full opportunity is afforded to expose the falsehood, dishonesty, and fraud in the first proceedings. Not so in naturalization proceedings. If it be admitted that there is an adverse party in naturalization proceedings the adversary in reality never has a day in court.

In the case of fraudulent naturalization there are *ordinarily* but two remedies: (1) A direct attack by bill in the proper court to set aside the judgment; (2) injunction restraining the party from exercising rights under the judgment, such as prosecuting a suit when valid citizenship is the essential prerequisite. (*United States v. Norsch*, 42 Fed. Rep., 419; *United States v. Gleason*, 78 Fed. Rep., 396.) But it is not necessary to discuss either of these remedies in determining the questions presented in the case under consideration, for it is conceded that this tribunal is without power to annul a judgment of naturalization even though it should be shown that it was fraudulently obtained; and the remedy by injunction would at least be of doubtful availability in the present case, because of the adequate facilities offered defendant for equitable defense in this jurisdiction, the only one having cognizance of claimants' case. The organic act provides that claims before this tribunal shall be adjudicated "according to the principles of equity," and it is a familiar principle of equity that "he who comes into equity must come with clean hands." This maxim—or, as it is otherwise expressed, "He that hath committed iniquity shall not have equity"—is the equitable application of a fundamental principle pervading the entire body of the law, "that no one shall be permitted to profit by his own fraud or take advantage of his own wrong, or to found any claim on his own iniquity, or to acquire property by his own crime." (*Riggs v. Palmer*, 115 N. Y., 506; *Fetter on Equity*, p. 39.)

This is an undisputed principle and needs no elaboration, in the present case especially, since the defendant admits that the Commission can not go behind a decree of naturalization in the sense of attempting to nulify it, "even upon a showing of the most palpable and barefaced fraud."

"It is a general rule, too familiar to require any citation of authorities in its support that 'a judgment, either of a legal or of an equitable tribunal, may be, in effect, vacated by a court of equity, if it was obtained by fraud.'" (2 *Freeman on Judgments*, sec. 489.)

"It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of court, a court of equity will disregard them all if necessary, that justice and equity may prevail." (*Warner v. Blakeman*, 4 *Keyes*, 507.)

Having invoked the jurisdiction of a tribunal specifically charged with applying the principles of equity in the adjudication of cases before it and virtually praying the enforcement of a judgment, which the defendant alleges was obtained by fraud, claimants can not complain if their demurrer admitting the truth of defendant's allegation and pleading the conclusiveness of the judgment is not allowed to arrest the court in the exercise of its unquestionable powers of equitable prevention. The defendant not only has the right to invoke the remedy of equitable prevention, to the end that fraud shall not taint this litigation, but the peculiar character of the claim, being in reality a suit for damages against a foreign government whose liability, and none other, the United States has assumed (Commission's decision in *Teresa Joerg* case, page 27 of Opinions, published in Senate document No. 25, second session Fifty-eighth Congress), imposes an obligation upon the defendant here to do so, to the end that ultimate justice may be done through the application of the principles of equity and of international law to the merits of the case.

The judicial status of this tribunal, its jurisdiction and powers being thus defined and understood, it becomes unnecessary to discuss extensively the question whether the United States can, in a domestic tribunal, administering exclusively municipal law, controvert the judgment of another of its domestic tribunals conferring citizenship upon an alien, for we shall hold that in the investigation and adjudication of the questions that arise in this case the Commission is sitting in the capacity of an international tribunal. When domestic tribunals are thus sitting, it is the established principle that municipal law, in the absence of a treaty stipulating otherwise, must be subordinate to international law when they antagonize each other, as that is the law common to both parties. It is only where the question is not within the domain of international that the municipal law may be invoked to determine the proper solution of the question.

Judgments of naturalization rendered by courts of competent jurisdiction, like other judgments not defective on their face, may be conclusive as between the naturalized alien and other parties raising the question before a domestic court administering only municipal law, and a careful exploration of the authorities relied upon by claimants show that they bear with substantial exclusiveness upon that class of cases. The case of *Spratt v. Spratt* (4 Pet., 392) is a leading case cited by counsel for claimants in support of the general proposition that a judgment of naturalization is conclusive upon the Commission, "whether or not the judgment of naturalization is as to Spain a foreign judgment." That was a case involving the title to real estate in the District of Columbia, and by no sort of interpretation or construction involved the administration of international law. It was a dispute between parties in their individual capacities, one purely

of local domestic law and administration, and therefore without any relevancy to the principles of international law administered by an international tribunal, or a municipal court sitting in the capacity of an international tribunal.

The case of *Campbell v. Gordon* (6 Cranch, 176) involved the question of title to land in Virginia. The question was, What effect should be given by a domestic tribunal to a judgment rendered in another domestic tribunal the settlement of which required the application of municipal or domestic law pure and simple? No international question and no principle of international law arose in the case. The same may be said in reference to the case of *Stark v. Insurance Co.* (7 Cranch, 420). In that case the question of American citizenship arose on the objection of defendant to the record of naturalization of the plaintiff, and the objection went simply to the regularity of the proceedings and to the introduction of parole evidence in aid of the record. The Supreme Court held that it need not appear by the record of naturalization that all the requisites prescribed by law for the admission of aliens to the rights of citizenship have been complied with. It involved the ownership of American property by an American citizen, and the determination of that question was submitted to a municipal court of the United States administering purely domestic law. The fact that the judgment in these cases was a judgment of naturalization presents no international question, because the statutes of the United States relating to naturalization are no more international in their character than the statutes which settle the rights of our citizens to the enjoyment of any other domestic privilege, and a judgment of naturalization pleaded in a cause involving the title to property in the United States before a domestic tribunal administering only municipal law raises no more of an international question than a judgment on contract or on promissory notes. The degree of conclusiveness of the judgment would be just the same in either case. It will be seen, therefore, that the question in all of these cases was simply the force and effect which should be given by a domestic tribunal to a judgment of another domestic tribunal administering purely municipal law. It is material, however, to notice that in none of these cases was the question of jurisdiction or fraud in the procurement of the judgment raised, and therefore that it does not appear what the decision in each of these cases might have been if the objection to the naturalization proceedings had been, as alleged in the case now under consideration, obtained through fraud practiced upon the court.

Bearing in mind that the Commission in the trial of this case is "sitting in the capacity of an international tribunal;" that in a former case it has been decided by the Commission "these claims remain in their nature international and are to be tried by the principles by

which the liability of independent nations, one to another, is governed," and "that the sole question before this Commission is that of the primary liability of Spain, which is not in any way enlarged by the Government of the United States, to adjudicate and pay such claims," would it be impertinent or incompetent for Spain to challenge the applicability of the principles announced in the decisions referred to, and all others of similar import, upon the ground that they are the decisions of purely domestic tribunals, administering the municipal law of the United States regarding a subject-matter with which it is in nowise concerned, namely, the settlement of titles to property which is always and everywhere determinable by the *lex loci*? Manifestly not. But suppose the response to be that nevertheless the judgment of naturalization of Ruiz, so far as the right of his heirs to maintain this action is concerned, is valid and binding in every jurisdiction until it is conclusively shown it was obtained by fraud, and that Spain should then offer in evidence the official record of proceedings before a Spanish tribunal of competent jurisdiction, wherein Ruiz, after his alleged naturalization in the United States, being at the time a resident of Cuba, in a case involving his allegiance to the Sovereign of Spain, had been adjudged to be a Spanish subject; and, furthermore, that his attempt to acquire American citizenship was a fraud on his native land, would it be argued that this Commission must give full faith and credit to the American judgment of naturalization and must disregard the Spanish adjudication entirely? The mere asking of this question echoes its answer, and is an illustration of the unsoundness of the position that an international tribunal is to be bound by the judgment of the domestic tribunals of either one of the parties to the controversy.

It is now universally admitted that every independent State has, as one of the incidents of its sovereignty, the power not only to regulate the local obligations of aliens resident in its territory, but to confer upon them national privileges and immunities, even the full rights of citizenship, by the proceeding called naturalization. The law for this proceeding, by which the nationality of a foreign-born citizen or subject is changed from that of birth to one of adoption, is the creature of modern States and necessarily local, and is a distinct invasion of the rights of the country of nativity over its subject or citizen, in whatever part of the world, as maintained until within comparatively recent years. Such laws are made and administered without reference to the consent of the country of nativity to the release or the transfer of the allegiance of such subjects or citizens. The municipal laws of the States whose subjects or citizens are so naturalized being thus disregarded and in fact set at defiance, it must follow that the naturalization proceedings can not have conclusive extraterritorial application.

The extraterritorial force of a judgment, like the law authorizing naturalization, is a thing of modern recognition, and therefore we must look to the more recent writers for the best opinions on this and allied subjects, and we find them in practical accord with the doctrine just stated. Calvo (*Derecho Internacional*, vol. 1, p. 295 et seq.), while laying down the same doctrine, says:

International law recognizes the power (or faculty) in a State to naturalize the subjects or citizens of another; but naturalization does not take place by virtue of said international law, but as a consequence of local legislation; so that the new citizen or subject is the pure and exclusive creation of the civil and political laws of the country of adoption, and he will enjoy solely the rights, privileges, and immunities which they confer. And what has been said of naturalization applies to expatriation, or the breaking of the natural bonds of citizenship, which have their origin and are preserved forever in the shadow of local legislation. The right of expatriation, then, like that of naturalization, is subordinated under the point of view of international law to the general principle that each independent State is sovereign in its own territory and that its laws are binding upon all persons who are within its jurisdiction, but that they have no force beyond its territory.

The distinction drawn and the reasoning invoked by this eminent author make it perfectly clear that the proceedings or judgment of naturalization can be conclusive only within the jurisdiction of the country through whose laws the nationality of a subject or citizen is changed from the country of nativity to the country of the court granting the judgment.

Conceding that it might be held by a domestic tribunal, sitting exclusively in its capacity of a municipal court and therefore administering only domestic law, that a judgment of naturalization rendered in a domestic tribunal of competent jurisdiction was *ipso facto* conclusive, it does not follow that it would hold the same way when sitting in the capacity of an international tribunal.

The Commission, in a former case, has decided—

That the sole question before this Commission is that of the primary liability of Spain, which is not in any way enlarged by the agreement of the United States to adjudicate and pay such claims. (Op. Commissioner Wood, p. 27.)

which is the equivalent of holding that Spain is the real defendant, and therefore entitled to make any defense which she could make before an international or mixed commission.

The fundamental question, therefore, for present consideration is the effect given by international tribunals to judgments of a domestic tribunal of one of the parties to the controversy.

Article VII of the treaty of 1794, between the United States and Great Britain, provided for indemnification by Great Britain to American creditors by reference to a mixed commission, and directed that "the commission shall decide the claims in question according to the merits of the several cases and the justice, equity, and the law of nations," language strikingly similar to that in the treaty under which this Commission is sitting.

One of the first and most important questions that arose before the board of commissioners organized to carry the treaty of 1794 into effect was whether "the sentence of the Supreme Court of the nation," which it was admitted was "binding on individual persons and things within the jurisdiction of the court," was "conclusive as to the law, not only on the subjects of this Government but on foreign nations."

The tribunal decided that it was not conclusive, and Commissioners Gore and Pinckney, both eminent international authorities, rendered elaborate opinions discussing the question most thoroughly. Mr. Commissioner Gore said (quoting very briefly from his lengthy opinion):

That the decision of any court, however respectable its members, is conclusive on foreign governments as to the law of nations, and that the principles on which it is founded may not be rightfully contested, as contrary to that law, is not, in my belief, warranted by just ideas of the equal independence of nations or by their practice.

To suppose the decisions of the courts of any country conclusive evidence of the law of nations would be to suppose that nation always right who captures and condemns the effects of another, and that always wrong who complains of and on failure of other means seeks redress for such captures and condemnations by letters of marque and reprisal; and yet after a condemnation of effects taken in virtue of such letters, according to Mr. Gostling's position, such condemnation would be conclusive evidence of the law of nations.

It does not coexist with the equality of independent nations to regard the decision of one, merely because it was the decision of that nation, as conclusive evidence of the law of nations; and other nations or other judicial courts pronouncing that law would adopt the decisions of no court only so far as such appeared to them to correspond with its principles and rules.

The decision of a judicial court, judging on the law of nations, can not be considered more conclusive or binding on others than the judgment of that nation expressed by a different organ of its government. In the practice of nations there are many instances of difference of opinion as to what acts are, or are not, correspondent with the law of nations, and each asserting and maintaining its right to decide for itself against the express opinion of the other. (3 Moore, 3162-3163.)

The opinion of Mr. Pinckney is even more elaborate (3 Moore's International Arbitrations, 3180, 3206). It will be remembered that the sentence (judgment) of condemnation in an admiralty court had, upon appeal of the claimants, been affirmed by the lords commissioners of appeal, the supreme judicature in the Kingdom in matters of prize. The leading question was whether the international tribunal was bound and concluded by that affirmance so as to be prevented from examining into the case. The principal objection urged by the agent of the British Government was that the judgment was conclusive because it had "been given [in] a solemn decision by the Supreme Court of the law of nations in the Kingdom" which other authorities, proceeding by the same law, are bound to respect and confirm." A brief quotation from the opinion of the distinguished commissioner will suffice to show that at this early date in the history of international arbitration the conclusiveness of a foreign judgment was

disputed in a discussion of the subject so elaborate and learned that the views then expressed were adopted by a majority of his colleagues and accepted as correct expositions of the doctrine by both governments, and substantially without exception have been followed by every international tribunal down to the present time. Says Mr. Pinckney:

Upon the fullest consideration of this objection I have stated it to be my opinion "that the affirmance of the condemnation by the Lords does in no respect bind us as commissioners under the seventh article of the treaty, and that it is no further material to our inquiries in the execution of the trust confided to us than as it goes to prove that compensation was unattainable by the claimants in the ordinary course of justice."

It has been explicitly understood that the opinion I have thus delivered is in precise conformity with that of His Majesty's Government; but as the objection to which it is opposed has been repeated by the agent on every occasion that has since occurred, notwithstanding the avowed disapprobation of its principles by those from whom his authority is derived, and as one of the board has not only sustained the objection by his ultimate opinion, but recorded the reasons which have induced him to do so in the nature of a protest against the decision of the majority, I feel it to be my duty to reduce to writing and to file the reflections which have led me to the foregoing conclusion.

Denying with indignation the suggestion of the British agent that the King was a party, and therefore the judgment was more especially conclusive, he said:

But even if the allegation were true, there is certainly more novelty than correctness in the argument that a judgment of His Majesty's own court, composed of the members of his own council, is the more especially entitled to a conclusive quality * * * because His Majesty was himself a party to the suit. I am very far from being disposed to insist that the judgment of the Lords of appeal is *less* to be respected on that account; but it is neither indecorous toward that high court nor unreasonable in itself to say that the extensive binding force, now for the first time attributed to their sentences, could not be rested on a foundation so little calculated to support it.

In order to ascertain whether the sentence of the Lords in this case (however unjust it may be) is conclusive upon this board *under the treaty*, it is previously to be inquired whether the Government of the United States, independent of the treaty, would upon the application of the claimants for redress against the capture and condemnation confirmed by it, by way of reprisals or otherwise, be bound by the law of nations to esteem it just, although upon the face of it it was manifestly the reverse.

The United States has never been more ably represented on an international commission than in this initial instance with Great Britain. Mr. Gore, popularly known as the legal preceptor of Daniel Webster, was one of the profoundest lawyers of his day, filled many of the high places aspired to by the profession, including the governorship of Massachusetts and Senator in Congress. But his most distinguished service was as a commissioner under the treaty of 1794.

Among the brilliant men who have adorned the public service of this country William Pinckney deservedly stands in the front rank.

John Bassett Moore says of him: "Never a seeker after preferment, he was continually chosen, either by the suffrages of his fellow-citizens or by executive favor, to positions of public trust and responsibility, which he filled with distinction to himself and advantage to his country." At home and abroad, in the Senate of the United States, in the Cabinet, as minister to Russia and the court of Naples he was equal to every demand. But his distinguishing preeminence was as a lawyer. No lawyer ever received a stronger tribute than was paid to him by Chief Justice Marshall in a formal opinion of the Supreme Court. (The *Nereide*, 9 Cranch, 388, 430.)

It is not strange, therefore, that the opinions delivered by Mr. Gore, and more especially by Mr. Pinckney, as members of the board of commissioners under Article VII of the treaty of 1794, should have been accepted by the two English great constitutional nations of the world a century ago as the correct interpretation of the international problems discussed by them. Nor is it to be marveled at that down through our developing jurisprudence the principles enunciated by them have come to us as established doctrines. Referring to Mr. Pinckney's opinions, and especially the one in the case of the *Betsey*, Mr. Wheaton said: "They are finished models of judicial eloquence, uniting powerful and comprehensive argument with a copious, pure, and energetic diction."

Another eminent writer on international law, a publicist of world-wide fame and authority, discussing this question, says:

It was maintained before the British and American Mixed Commission, sitting in London under the treaty of 1794, that a decision of a British prize court estopped the party against whom it was made from proceedings, when a foreigner, through his own government. This was contested by Mr. Pinckney, and his position was confirmed by the arbitration, acting under the advice of Lord Chancellor Loughborough, and is now accepted law. (Wharton, 2d ed., sec. 242.)

And in III Wharton (2d ed., p. 198) it is said:

The prevalent opinion now is that in international controversies a sovereign can no more protect himself by a decision in his favor by courts established by him, even though they be prize courts, than he can by the action of any other department of his government.

The doctrine is so generally approved by writers on international law that we deem it unnecessary to refer any further to that vast field of authority.

Perhaps no government ever appeared to greater advantage than the United States did before the Geneva arbitration, when Hon. Caleb Cushing, Hon. William M. Evarts, and Chief Justice Waite maintained the doctrine of the inconclusiveness of a judgment rendered in a British court before that august tribunal, in the case of *The Florida*. In that case the vice-admiralty court of the Bahamas, by its decree, which is given at page 521 of the fifth volume of the appendix to the

American case, acquitted *The Florida* of every charge, but the great lawyers above named contended for the principle that—

As between the claimants of the vessel and Her Majesty's Government seeking to enforce a forfeiture under the provisions of the foreign enlistment act, this decree may have been conclusive; but as between the United States and Her Majesty's Government it has not that effect.

And this is exactly the distinction we are endeavoring here to point out. Regardless of whether judgments of naturalization are under all circumstances conclusive as between the naturalized alien and any other person raising the question in the United States, Spain was no party to those proceedings, and before a tribunal, whether in all its features international, or a municipal court sitting in the capacity of an international tribunal, has the right to inquire into the facts upon which those proceedings were based and the judgment rendered. The conclusive character which it is argued attaches to domestic judgments, where sued upon in another State of the United States, is, in virtue of the constitutional provision requiring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and of the act of Congress passed in effectuation of this provision of the Constitution. The Supreme Court, in the case of *Christmas v. Russell* (5 Wallace, 290), has adjudicated this very question. The court says:

Common-law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules a foreign judgment was *prima facie* evidence of the debt, but it was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained.

It is not denied that some of the authorities relied upon in support of the conclusiveness of a foreign judgment *seem* to sustain this contention and therefore may serve to raise the presumption that judgments *in rem*, under some extraordinary conditions, may not be inquired into, even by an international tribunal, yet a close scrutiny of the facts, as well as the law in the cases referred to, leave it to be indisputably true that a foreign judgment is universally impeachable for fraud. Black states the principle thus:

In the present state of the English authorities it seems to be well settled that fraud may always be set up as a ground of impeachment against a foreign judgment, and that if it be shown that fraud was successfully practiced in the concoction or procuring of the judgment the court will treat it as of no effect and will refuse to recognize or enforce it. (2 Black on Judgments, sec. 844, citing numerous English adjudications.)

Freeman on Judgments (4th ed., vol. 2, sec. 595) is to the same effect, saying that a foreign judgment to be conclusive must be "free from the taint of fraud in the procurement."

Story on Conflict of Laws (sec. 608), says:

The general doctrine maintained in the American courts in relation to foreign judgments is that they are *prima facie* evidence, but that they are impeachable; but how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared that the jurisdiction of the court and its power over the parties and the things in controversy may be inquired into, and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn.

The inference clearly is that this eminent jurist, writing half a century ago, held the opinion that foreign judgments were only *prima facie* evidence and that they were subject to impeachment generally. Black on Judgments, the latest work, says:

So far as the question has been considered by our own courts this (the doctrine of the English authorities, *supra*) may be said to be also the prevailing doctrine in this country, citing *Rankin v. Goddard*, 54 Me., 28; *Fisher v. Fielding*, 67 Conn., 92; *Hilton v. Guyot*, 159 U. S., 113, and many others.

It has very recently been held in an English case, where the action was upon a judgment recovered by the plaintiff against the defendant in a Russian court, and the defendant pleaded that the judgment was procured by fraud and deceit of the plaintiff and by false representations and false evidence given to the court, that the defense was good and sufficient, and this notwithstanding the question of the alleged fraud had been investigated and negatived in the foreign court. (*Abouloff v. Oppenheimer*, 10 Q. B. div., 295.)

Singularly enough, Black, who refers to this decision with approbation, follows this (see sec. 844) with the remark that—

In a late American case where the same question arose this ruling was disapproved, and it was stated that the doctrine of the English decision was not borne out by the cases cited in its support, and the opinion was expressed that false testimony and the suppression of the truth do not constitute the kind of fraud by which judgment is vitiated and may be nullified.

He was referring to the case of *Hilton v. Guyot* (C. C., 42 Fed., 252) apparently overlooking the fact that this case had been reversed by the Supreme Court (159 U. S., 113). In that case, on appeal, the Supreme Court undoubtedly sustained the English doctrine, as stated by Black:

But it is now established in England, by well considered and strongly reasoned decisions of the court of appeals, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.

Mr. Justice Gray, who delivered the opinion in the *Hilton v. Guyot* case, and from which the paragraph just above quoted is taken, discusses extensively the decisions of foreign courts generally upon that question, and concludes his opinion as follows:

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that inter-

national law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country which did not give like effect to our own judgments. In the absence of statute or treaty it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment has been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sned on would be held inconclusive in almost any other country than France. In England, and in the colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation it would be subject to reexamination, either merely because it was a foreign judgment, or because judgments of that nation would be reexaminable in the courts of France.

The principle thus impressively announced by the highest tribunal in the United States has been announced in many State decisions, but nowhere with more precision and force than in the case of *Bryant v. Ela* (Smith (N. H.), 396, 404):

The respect which is due to judgments, sentences, and decrees of courts in a foreign State, by the law of nations, seems to be the same which is due to those of our own courts. Hence the decree of an admiralty court abroad is equally conclusive with decrees of our admiralty courts. Indeed, both courts proceed by the same rule, are governed by the same law—the maritime law of nations (Coll. Jurid., 100), which is the universal law of nations except where treaties alter it.

The same comity is not extended to judgments or decrees which may be founded on the municipal laws of the State in which they are pronounced. Independent States do not choose to adopt such decisions without examination. These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself. Wherever, then, the court may have proceeded on municipal law the rule is that the judgments are not conclusive evidence of debt, but *prima facie* evidence only. The proceedings have not the conclusive quality which is annexed to the records or proceedings of our own courts, where we approve both of the rule and of the judges who interpret and apply it. A foreign judgment may be impeached; defendant may show that it is unjust, or that it was irregularly or unduly obtained. (Doug. 5, note.)

Referring to all the treaties and the decisions of international tribunals since the treaty of 1794 with Great Britain down to the arbitrations just concluded with Venezuela, we have been unable to find a

single case in which the principle laid down in the case of the *Betsey*, and which is in this case adhered to, where the contrary doctrine—the one contended for by claimants in this case—has been maintained. The only instance in which there is a semblance of a departure from this doctrine was in the case of the United States and Spanish Commission of 1871. Mr. Blaine, then Secretary of State, instructed the agents of the United States in regard to the powers of that Commission that “a certificate of naturalization as a citizen of the United States can not be impeached for fraud before an international commission.” It is clearly shown by his letter that, as the Commission had been established by the Executive act of the United States and Spain, and as the executive departments of the two Governments had no power to annul or impeach a judgment of the other country, it was his opinion that the Commission, the creature of the two countries, could not. Mr. Evarts, however, Mr. Blaine’s predecessor as Secretary of State, and Mr. Frelinghuysen, his successor in office, both great lawyers, held opinions contrary to Mr. Blaine’s. Mr. Evarts said, in his letter to the Spanish minister, March 4, 1880, in regard to the powers of the Spanish-American Commission of 1871, that—

The Government of the United States from the first considered, and it is still maintained, that the Commission established under the convention of 1871 was an independent judicial tribunal, possessed of all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent in the jurisdiction conferred upon it to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either Government to interfere with, direct, or obstruct its deliberations.

And Mr. Frelinghuysen wrote to Mr. Suydam, counsel for the United States before the Commission, September 25, 1882, as follows:

This Government, while holding, as before stated, that the judgment of naturalization, unimpeached by fraud, is complete evidence of its own validity, can not deny that, under the terms of the agreement, the certificate of naturalization may be proven to have been obtained fraudulently. * * * The true rule to govern the Commission is that when an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, it can only be impeached by showing that the court which granted it was without jurisdiction or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law.

The case of *Ortega*, No. 91, before the United States and Spanish Commission of 1871, was decided before Secretary Blaine asserted the proposition that a judgment of naturalization was conclusive of every question before the Commission. In that case the judgment was not attacked for fraud nor for any want of jurisdiction in the court which granted it, but merely on the grounds that the proceedings were irregular, and that the facts before the court granting the naturalization

were untrue. The only question before the Commission was its right to go behind the judgment and ascertain the truth; and upon their interpretation of international law they held that the judgment of naturalization granted by a court of the United States of competent jurisdiction was not conclusive. It was, perhaps, because of the possible effect of this decision upon future cases that Secretary Blaine took the emphatic position he did, which temporarily arrested the progress of the Commission and resulted in a modification of the agreement between the two Governments under which the Commission was sitting. This also explains Secretary Frelinghuysen's diplomatic reference to the "terms of the agreement" in his letter of September 25, 1882, in which he says: "This Government, while holding, as before stated, that the judgment of naturalization, unimpeached by fraud, is complete evidence of its own validity, can not deny that, under the terms of the agreement, the certificate of naturalization may be proven to have been obtained fraudulently." A close study of Mr. Blaine's letter, and the argument of the advocate of the United States in the Buzzi case, No. 22, which arose subsequent to Mr. Blaine's declaration, leads us to think that their contention was based on the theory that the agreement itself expressly limited the right of Spain to require the production of the naturalization papers, and when they were shown, the right to question the naturalization was at an end. At any rate all the cases before that Commission involving this question, whether before or after Mr. Blaine's declaration and the modification of the terms of the agreement, were decided against the conclusiveness of a foreign judgment. (See in addition to cases before referred to Angarica, No. 17, and Criado, No. 29.)

The United States and Mexican Commission of 1893, in the case of *Howlands v. Mexico*, which was a customs case, where the Supreme Court of Mexico ordered the restoration of the property, the Commission held that it had jurisdiction and disregarded the judgment of the Mexican court, which had refused damages and costs and awarded claimant \$18,000. This and other cases following show that the decisions on this subject are not peculiar to prize judgments.

Before the United States and Costa Rica Commission of 1860, in the Medina case, it was held that the Commission was not bound by a judgment of naturalization in the United States. The case is reported at length in III Moore's International Arbitrations, page 2583, et seq. The following brief extract, however, will clearly show the opinion of that Commission:

To give to naturalization certificates in a foreign land or before an international tribunal an absolute value, which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this Commission would be placed in an inferior position and denied a faculty which is said to belong to a tribunal in the United States.

The United States and Mexican Commission of 1868, in the case of Mather and Glover, No. 178, referring to a judgment of the Supreme Court of Mexico, and speaking by Commissioner Wadsworth, says:

Such a decision by the Supreme Court may be binding upon all inferior tribunals in Mexico, and while it is entitled to much respect here it is not conclusive upon this Commission.

The British and American Mixed Commission of 1871 held that it had power to review judgments in prize cases rendered in the courts of the United States. Hale's report of that Commission, on page 88, says:

The question was early raised, on the part of the United States, as to the jurisdiction of these prize cases by the Commission, both in respect to cases where the decision of the ultimate appellate tribunal of the United States had been had, and to those in which no appeal had been prosecuted on the part of the claimants to such ultimate tribunal. As to the former class of cases, the undersigned may properly state that he personally entertained no doubt of the jurisdiction of the Commission, as an international tribunal, to review the decisions of the prize courts of the United States, where the parties alleging themselves aggrieved had prosecuted their claims by appeal to the court of last resort. As this jurisdiction, however, had been sometimes questioned, he deemed it desirable that a formal adjudication by the Commission should be had upon this question. The Commission unanimously sustained their jurisdiction in this class of cases, and, as will be seen, all the members of the Commission at some time joined in awards against the United States in such cases.

The United States and French Commission of 1880 in the Kuhnagel case, as reported in III Moore's International Arbitrations, page 2649, held that the Commission "had the right to examine the original proceedings for naturalization, and, finding that the certificate of naturalization was obtained by misrepresentation of material facts, we hold it to be null and void."

Before the Geneva Tribunal it was urged by Great Britain that the vice-admiralty court in the Bahamas acquitting the *Florida* should be accepted as conclusive. This great tribunal, however, held otherwise, and several opinions were delivered on the subject. The opinion of Count Sclopis, speaking for the Commission, says:

The decision of the vice-admiralty court may then be considered as conclusive, even if not perfectly correct, as between those who claimed the vessel and the British Government, which claimed its confiscation under the clauses of the foreign-enlistment act; but I do not think it is sufficient to bar the claim of the United States against Great Britain. The United States were not parties to the suit; everything relating to it is for them *res inter alios acta*.

Mr. Staempfli in a separate opinion in the same matter says:

The objection that the judicial decision at Nassau relieves Great Britain of all responsibility can not be maintained. As regards the internal (or municipal) law, the judgment is valid; but as far as international law is concerned, it does not alter the position of Great Britain. (Papers relating to the treaty of Washington, vol. 4, p. 92.)

Before the very recent Commission between the United States and Venezuela of 1903 the identical question that we have here under consideration arose, namely, the conclusiveness of a judgment of naturalization in the United States, and the unanimous decision of the Commission was that such a judgment is not "conclusive upon the United States or upon this tribunal." The opinion was rendered for the Commission by Mr. Bainbridge, Commissioner for the United States. It gives an exhaustive résumé of the adjudications by international tribunals, the decisions of the courts of England and the United States, also of the diplomatic expressions of the State Department, and expresses its own conclusions as follows:

The present Commission is charged with the duty of examining and deciding all claims by citizens of the United States against the Republic of Venezuela. It is absolutely essential to its jurisdiction over any claim presented to it to determine at the outset the American citizenship of the claimant. And the fact of such citizenship, like any other fact, must be proved to the satisfaction of the Commission, or jurisdiction must be held wanting.

Whatever may be the conclusive force of judgments of naturalization under the municipal laws of the country in which they are granted, international tribunals, such as this Commission, have claimed and exercised the right to determine for themselves the citizenship of claimants from all the facts presented. (See Ralston's report, Venezuelan Arbitrations, 1903, p. 42, and authorities there cited.)

No case has come under our observation where the question arose before a purely domestic tribunal exercising international powers and jurisdiction, but it is not perceived that the rule could or should be different in such a case.

The judgment of naturalization is *prima facie* evidence of its regularity and will be given "full faith and credit" until the defendant overcomes its conclusiveness by proof. The degree of proof which will constitute a sufficient demonstration by the defense in cases of fraudulent naturalization must necessarily rest in the discretion of the Commission, there being no adjudicated cases, so far as we have been able to discover, which furnish definite guides in this regard.

The burden upon the defendant in this case is to prove the legal fraud perpetrated by claimant in the procurement of his naturalization certificate and can not be shifted by evidence showing errors or irregularities in the proceedings or by raising a doubt merely in the mind of the Commission. The proof can not stop at showing that the facts made to appear to the satisfaction of the court which granted naturalization were false. It must at least go to the extent of satisfying the Commission that the claimant knew the statements and representations made by him at the time he filed his original declaration and at the time of procuring the judgment were false, or facts must be proven from which such fraud would be implied, and it must appear that his false representations and the representations procured

by him to be made by the other witnesses were intentionally used by him for the purpose of deceiving the court and thereby securing his certificate of naturalization.

The demurrer to defendant's amendment to the answer is overruled without arresting the further progress of the case, which will proceed now to a hearing upon evidence to be submitted regarding fraud.

Mr. Commissioner Maury dissents; the grounds of dissent to be hereafter stated.

Order accordingly issued January 28, 1905.

APPENDIX E.

[No. 34.]

DISSENTING OPINION OF COMMISSIONER MAURY.

I am unable to agree with a majority of the Commission in their action overruling the demurrer in this case, and in view of the importance of the question involved deem it a duty to state the grounds of my dissent with some particularity.

The claimants and petitioners are the widow and minor children of Ricardo de Ruiz, who, the petition alleges, was a duly naturalized citizen of the United States engaged in the occupation of dentist in a town in the island of Cuba called Guanabaco and earning a support for himself and family, when, in February, 1897, he was arrested, as stated, without ground, by the Spanish officials and cast into prison, where, it is alleged, he was subjected to such treatment as to cause his death, which occurred during the month in which he was arrested and imprisoned.

It is for this alleged wanton and cruel deprivation of their mainstay and support and for the cruelties also stated to have been practiced on him in his lifetime that indemnity is demanded at the hands of the United States, in virtue of Article VII of the treaty of peace with Spain.

The Government in its answer seeks to meet and avoid the allegation in the petition that Ruiz, through whom the petitioners claim, was a naturalized citizen of the United States by virtue of an order of the court of common pleas of the city of Philadelphia of January 21, 1880, by alleging that Ruiz procured the order in question by fraud, the particulars of which the answer sets forth as follows:

That the said Ruiz on or about the 21st day of January, 1880, when he made application for such citizenship, stated and represented under oath to said court that he had resided within the United States for more than five years last passed, immediately preceding his application for such citizenship, and at the same time caused and procured one Antonio Lezama, a witness called by him, to make like representation and oath to such court, he, the said Ricardo de Ruiz, well knowing that said representations were false, for that he, the said Ruiz, first arrived in the United States on or about May 24, 1876, previous to which date he had never been in the United States, and therefore at the time he made application for such citizenship, as aforesaid, he had been in the United States only three years seven months and twenty-seven days; that he, said Ruiz, made and caused to be made to said court said false representations for the purpose of inducing said court to, and said court did, act and rely thereon, and any papers of citizenship which may have been issued to

him, said Ruiz, were so issued by said court acting and relying upon the truth of said false and fraudulent representations, and but for which said court would not have issued to him any such papers conferring upon him the right of citizenship in the United States.

To this matter of avoidance in the answer the petitioners by their counsel demur, alleging as ground therefor that the certificate of naturalization granted to Ruiz "was a judgment of a court having competent jurisdiction, and is not subject to impeachment or review by this Commission."

The Commission, without any claim whatever of jurisdiction to cancel or compel the surrender of the certificate of naturalization issued to Ruiz, has, nevertheless, by overruling the demurrer, concluded to go behind the certificate and investigate the charge of fraud in its procurement, and, in case the charge is established, refuse to give the certificate effect *in this case*, leaving it, however, to be treated as a valid and operative certificate for all other purposes in the hands of the widow and children of Ruiz. In other words, as I understand the position of the Commission, it amounts to this, in the last analysis, that the certificate of naturalization held by Ruiz for seventeen years, and up to his death, is worthless in this case on what I conceive to be *ethical grounds*, but that it may be, at the same time, valid and operative elsewhere on *juridical grounds*.

The position of the Commission is contradictory to one of the best settled and most useful principles of private international law; which is remarkable, considering that the Commission in deciding this case has proceeded on the idea that it is invested with the powers of an international tribunal established by treaty between nations, among which, it is said, is the power of administering justice by the rules of the law of nations, unhampered by those of municipal law. And here it should be understood that by a fiction Spain, without interest, substantial or sentimental, is made to perform a ghostly part in the purely domestic controversies between American citizens and their Government before this Commission, which, by this forced process, is supposed to be invested with an international character.

It is conceded that by the municipal law, as laid down in the Federal and State courts of the United States, the Commission could not have overruled petitioners' demurrer, and I hope to be able to show that the action of the Commission on the demurrer is equally unwarranted by the law of nations.

I will begin by quoting a remark of Lord Hardwicke's which is characterized by great good sense and frequently referred to. His Lordship, speaking with regard to the alleged validity of a certain foreign marriage, said: "It has been argued to be valid from being established by the sentence of a court in France having proper jurisdiction. And it is true, that if so, it is conclusive, whether in a for-

oreign court or not, *from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain.*" (Roach v. Garvan, 1 Ves. Sr., 159.)

Upon the same principle of general international convenience the Supreme Court, in the great Koskiusko case, allowed in evidence, to prove kinship, two decrees of Russian Courts of Nobility, treating them as purely *in rem* and good "against all the world," having been rendered by courts of competent jurisdiction. (*Ennis v. Smith*, 14 How., 400, 430.)

"It is for the convenience of mankind that judgments *in rem* should be binding on all the world, * * *" said Mr. Justice Fry, interrupting counsel, in the case of *De Mora v. Concha* (29 Ch. Div., 292), where the effect of judgments *in rem* was extremely well discussed at the bar.

There is commanding authority for the proposition that judgments *in rem* defining permanent personal *status* are not open to attack or question collaterally for any purpose. The convenience of the nations requires that such *status* should stand effective everywhere until annulled by the authority that defined it. And the same may be said of cases of permanent *status* not originating in a judicial act.

By permanent *status* I mean a personality conferred by law without limitation as to time or place, such as naturalization, legitimacy, adoption, and marriage. (See Minor on Conflict of Laws, sec. 71, note 5, p. 143, and sec. 97, p. 212, ed. 1901; *Miller v. Miller*, 91 N. Y., 315, 319; *Ross v. Ross*, 129 Mass., 243; *Adams v. Adams*, 154 Mass., 290, 293.)

The principle as stated above belongs to private international law and not to municipal law, although, of course, recognized by it, as is obvious from the following authorities:

Story says that this rule, so widely favored by the Continental jurists, owes its beginning to "the extreme inconvenience which would otherwise result to all nations from a perpetual fluctuation of capacity, state, and condition upon every accidental change of place of the person or of his movable property." (Conflict of Laws, sec. 67.)

The rule as to personal *status* is the result of the *tacit agreement of nations*, attested by the almost unanimous agreement of authors. (Fœlix, Droit International, par Demangeat, Tome 1, p. 64, Paris, 1866.)

Boullenois says that the rule is for the greatest good of commerce and of intercourse among men. (Traité, etc., Tome 1, p. 152.) He also refers to the fact that Burgundus, who denied any effect to a judgment outside the country where rendered, made a single exception in favor of judgments that determine the *status* and conditions of persons. (Ibid., p. 603.)

Pardessus says: "The general consent of civilized nations has de-

creed that whatever concerns the capacity of an individual should be regulated by the laws of the country to which he belongs." (See Fœlix, Tome 1, p. 62.)

To these authorities Fœlix and Demangeat add a long list of others, to the same effect. (Ibid., p. 62.)

From this universality of the permanent personal *status*, we have the necessary, the inevitable deduction of its *unity and indivisibility*. It is no exaggeration to say that it clings to the individual as the leprosy does to the skin, to borrow the forcible, if not elegant, illustration of some of the older authorities. Boullenois says the personal *status* pervades the whole being to whom it belongs. Others illustrate the idea thus: *Qualitas personam sicut umbra sequitur*.

To violate this principle of unity and indivisibility, as the Commission appears to have done unconsciously in this case, is to commit a legal solecism; for how can we speak of a person as, at the same time, legitimate and illegitimate; as of age and not of age; as capable and incapable of managing his affairs, and as being a citizen and not a citizen of the United States? Such is the character of the illustrations used by the Continental jurists. (Fœlix, Tome 1, p. 61; Proudhon, *Traité des Personnes*, Tome 1, p. 82.)

Indeed, it would be as incongruous to speak of a person as a leper in part and at the same time as whole, or as illegitimate in some respects although judicially found to be legitimate in all respects, or as having two mothers, as for an international tribunal to declare a man an alien for the purposes of a particular case, who is at the same time admitted to be a citizen in all respects by a judgment of naturalization rendered by a competent court.

In the face of these great names I am unable to see how this Commission, assuming, as it does in this case, to have the power that belongs to an international tribunal established by treaty between nations, can consistently refuse to respect the principle of unity and indivisibility which is ascribed to personal *status* by the private law of nations. This is the more remarkable when we consider that a judgment fixing the *status* of a mere thing is unassailable collaterally anywhere, *although the validity of the reasons for such judgment may be inquired into*, a distinction which does not appear to have excited the attention of the majority. (*De Mora v. Concha*, *supra*.) In other words, a judgment fixing the *status* of a ship stands on a higher plane than one establishing the citizenship or legitimacy of an individual, which is hardly agreeable to reason.

In a recent great case in England it was seriously doubted whether any degree of fraud in a foreign sentence *in rem* would affect the title of a *bona fide* purchaser under that sentence. (*Castrique v. Imbie*, L. R. 4 H. L. 414, 433.) With such a case compare that of the innocent widow and children of Ruiz standing in the presence of this

charge of fraud against the husband and the father, made for the first time eight years after his death and twenty-five years after the judgment of naturalization was rendered. Are not these innocents entitled to as much protection under their judgment *in rem* as the innocent purchaser in the case supposed possibly could be? Dismiss them from the Commission with the impress of American nationality still on them uneffaced, and we give Spain unanswerable ground to repudiate them as Spanish claimants, while by our own act we make them outcasts with no where to turn for redress.

Why the United States did not institute a direct proceeding in the proper court to cancel the certificate of naturalization issued to Ruiz has not been explained; and my voice is against allowing her to do *per indirectum* what it would, perhaps, better become her dignity to do *per directum*. Indeed, if the matter pleaded by the defense were not hopelessly bad, the Commission might now, by analogy to the practice in chancery, order the counsel for the Government to institute a direct proceeding in the proper court to cancel the Ruiz certificate, holding this case, meanwhile, in abeyance.

But whether Ruiz was foresworn or not in obtaining naturalization, I do not think the Government should be permitted to raise a contest on the point with his widow and children by a direct proceeding even.

Ruiz having held unquestioned the *status* of citizen of the United States up to the time of his death, some seventeen years, I deem it too late to spring the issue when he, the only witness who, presumably, could meet it, is in his grave. His lips being sealed, the Government should not be allowed to speak either.

Such a proceeding is against fair play everywhere, and humanity revolts at it. I take pride in saying that the common law abhorred it. By that system where a man born out of wedlock of parents who afterwards intermarried was treated by them as legitimate all his life and on his father's death allowed to enter as heir and die "seised in peace" leaving a son, for instance, that son took by descent to the exclusion of the lawful heir, whose entry and action were taken away *absolutely*,^a because to allow either *would have been to bastardize after death him who had been treated as legitimate all his life*, which

^a NOTE.—This is a remarkable, because in other instances descent cast only puts the real owner to his action, but here descent cast *destroys the right*, leaving the lawful heir, *though an infant at the time of descent cast*, neither entry nor right. Says Lord Coke:

"Hereby it appeareth that this discent differeth from other discent, for this discent barreth the right of the mulier [the lawful heir], whereas other discent do take away the entrie only of him that right hath, and leaveth him to his action, but here by the dying seised of the bastard, his issue is become lawfull heire. It is holden that if the mulier [the lawful heir] bee within age at the time of the dying seised, that nevertheless hee shall bee barred, because the issue of the bastard is in judgment of law become lawfull heire, and the law doth prefer legitimation before the privilege of infancie." (Co. Litt. *ubi supra*.)

the law would not tolerate. *Justum non est aliquem post mortem facere bastardum qui toto tempore vitæ suæ pro legitimo habebatur.* (Co. Litt. 244a; Sir Richard Lechford's case, 8 Co. Rep. 101a.)

Can Ruiz, who lived and died a lawful citizen, now be made a *bastard citizen* in his grave, as it were, for the purpose of defeating the claim of his innocent widow and children?

In the recent case of *Clyde Mattox v. The United States* (156 U. S., 237) you will find this principle of fair play strongly upheld. There it is laid down that a witness on a former trial who had died could not be discredited on the second trial by evidence of contradictory statements, because death had cut him off from an opportunity to protect his character and explain away the supposed contradiction; and this, though justice itself should thereby fail.

Could there be a stronger plea for the application of the principle of fair play than the case before us presents?

But assuming it to be of moment, which in my judgment it is not, to determine whether this Commission is entitled to take rank with international tribunals or is only a domestic municipal court, I am of opinion that a tribunal to be international and, therefore, as held by the majority, unhampered by municipal law, must in the nature of things be created by treaty between independent nations, and that it seems repugnant to reason to hold that Congress had power to invest this Commission with authority to exercise a jurisdiction above and beyond the Constitution and laws of the United States and the jurisprudence administered by the Federal courts.

It is true Congress has power to establish prize courts whose jurisdiction is to administer international law in time of war in connection with maritime captures, but the authority to do so is necessarily implied from the power conferred by the Constitution on Congress to declare war. So with the jurisdiction conferred by Congress on consular courts established in oriental countries. Such legislation is for the purpose of carrying out the provisions of treaties entered into between the United States and such countries and is not necessarily in harmony with the Constitution of the United States. (Revised Statutes of the United States, section 4083, and the following sections to the end of Title XLVII.)

Plainly, there is nothing in the treaty of peace that calls for the establishment of an international tribunal or, indeed, one of any kind. The most that can be said is that by Article VII of the treaty the United States agreed to "adjudicate and settle" the claims released by the article, but it was left entirely to the United States to determine how the stipulation should be carried out. Indeed, the failure of the treaty to designate the way in which the adjudication should be performed is, of itself, conclusive evidence that the matter was left entirely to the United States, Spain having no longer

any interest in the released claims, which she had fully satisfied by cessions of territory, although, indeed, her spectre is being continually raised here to serve some special purpose.

Of course this Commission, like any other domestic court, must apply the rules of international law when applicable; but, at the same time, where that code conflicts with municipal law the latter must govern as the law of the land. When, therefore, Congress legislates in contravention of a treaty the courts hold that such legislation supersedes the treaty as a rule of civil conduct, notwithstanding the treaty, by the law of nations, stands unrepealed so far as the other contracting power is concerned.

The case of *The Ship Rose v. The United States* (36 Ct. Cls., 290) seems to be much relied on as an authority to show that this Commission, in doing what it calls international justice, is not to be controlled by municipal law. But I think the case is misconceived and not at all in point.

It was a French spoliation case over which the Court of Claims had no jurisdiction as a court with power to render a judgment. Indeed, there was nothing contentious in the case, inasmuch as Congress had never consented that the United States should be sued at all and there was consequently no real plaintiff or real defendant, but merely the form of an adversary proceeding. In truth, the Court of Claims was simply performing the function of a committee of Congress to ascertain and report to Congress the law and the facts of the case, with its views thereon, that Congress might the better judge whether the rules of international law in force at the time the ship *Rose* was captured by the French authorized her capture and condemnation.

It is very plain, therefore, that when the claimants of the ship undertook to excuse their delinquency under the law of nations by an act of Congress the court had a ready answer; that in the controversy in the foreign prize court between the ship and her French captor the act of Congress had no relevancy whatever, as it could not possibly change the law of nations or afford any justification or excuse for the conduct of the ship which took place on the high seas, where the act of Congress could not operate.

This proceeding, or case, if you please, took place under the act of Congress of January 20, 1885 (23 Stats., 283), which expressly says (sec. 6): "Such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimant or Congress."

In *Gordon v. The United States* (117 U. S., Appendix, p. 699) the Chief Justice comments on this advisory function of the Court of Claims and likens it to that of an auditor or comptroller, saying: "The circumstance that one is called a court and its decisions called judgments can not alter its character nor enlarge its power."

But if Congress has power to establish tribunals that are at liberty to disregard the decisions of the courts that are the repositories of the judicial power of the Constitution, there is an end of the supposed coordination between the legislative and judicial departments of the Government.

Of course, a judgment may be attacked on jurisdictional grounds under all circumstances. Letters of administration and of guardianship and judgments of naturalization, for example, may be denied extritorial effect, but they can never be collaterally assailed, as in this case, on a ground that admits jurisdiction in the authority from which they emanated. This follows from the unity and indivisibility of *status*, which, in the nature of things, can not be exposed to attack or aspersion save in the jurisdiction authorized to vacate the act by which the particular *status* was conferred. The law of nations has settled down on this principle with reference to judgments establishing *status*, whatever latitude that code may allow the courts of one country when called upon to enforce judgments of other kinds rendered in foreign countries—a subject much considered in the opinion of the majority, but which I shall not go into, as, in my view, the case does not require it.

It is on the ground of the unity and indivisibility of *status* that the authority of a personal representative appointed by a competent court can not be questioned in any other court. But, if I understand the reasoning of the majority, the attack made on the judgment of naturalization would have been equally permissible if the petition here had been filed by the administrator of Ruiz, and the Government had made defense on the ground that the letters of administration were obtained by petitioner's false swearing. Indeed, a question based on this hypothesis was put to one of the learned counsel for the Government during the argument, but it failed to elicit discussion.

It is perfectly clear, therefore, that whether a judgment conferring *status* be limited in operation to a particular country, as letters of administration, or be without such restriction, as where permanent and universal, it must, from the principle of unity and indivisibility that inheres in it, be exempt from collateral attack or question of any kind.

As to the decisions of international commissions, relied on in the majority opinion as upholding the position taken in this case with regard to the demurrer, I must decline to give them precedence over the opinions of jurists of world-wide authority, and especially so when I fail to discover in the decisions of those commissions evidence that the question now in hand was philosophically considered.

APPENDIX F.

[Opinion No. 35.]

SPANISH TREATY CLAIMS COMMISSION.

HORMIGUERO CENTRAL COMPANY	}	Case No. 293.
v.		
THE UNITED STATES.		

DISSENTING OPINION OF COMMISSIONER MAURY.

Under considerable urgency and while away for the summer vacation, I prepared the following memorandum opinion, dissenting from the opinion of the other members of the Commission in this case:

I am unable to concur with my brethren in their opinion in this case.

In my judgment, the military art, as other arts, has its foundation in common sense, and may be challenged to answer at that bar.

When, therefore, the Spanish captains flew in the face of the truth, patent to the simplest mind, that "horses are quicker than men afoot," by employing infantry to quell an insurrection maintained by cavalry, ranging at will with sword in one hand and torch in the other, they committed a gross and inexcusable violation of common sense and ordinary diligence, and did no little to foster the belief that their disposition was rather to allow the insurrection to linger on for the sake of the pelf or promotion, or both, it was bringing them. How far that belief was founded will be shown at another time.

As I apprehend, hardly anything could be more reprehensible than the failure of Colonel Merrino to make even an effort to capture the munitions of war landed by the Roloff-Sanchez expedition and deliberately carted by the insurgents through the country from their landing place and delivered into the hands of Gomez, who was in straits for ammunition and just starting on that terrible "Invasion," made more terrible still by those supplies, whose track through Hormiguero and the rest of the island was soon to be marked by the burning cane fields and homes of peaceable American citizens.

It is said that Colonel Merrino was ordered before a court-martial and sent back to Spain in disgrace. The wonder is that he was not shot, considering the enormity of his offense.

These two instances of gross and far-reaching dereliction of duty by the Spanish authorities in Cuba were, in my judgment, sufficient to make Spain liable for all the damage done the Hormiguero Central Company by the insurgents. In the first instance Spain's negligence pervaded the whole insurrection. In the second and the other instances relied on by the claimant, omniscience alone can tell how far the

mischief extended, and it seems arbitrary and unjudicial, not to say presumptuous, to speculate about it. The safe rule of civil and criminal justice is that the wrongdoer's liability can not be qualified or apportioned in any way. Of necessity, then, the wrongdoer, if a nation, is as much in subjection to the principle as an individual.

In preparing the foregoing opinion, I had it in store to supersede it by another, fuller and better considered, which is my present object.

It is but to examine the evidence furnished by Spain from her military archives, and filed in this case, to be convinced that her captains in Cuba frittered away her strength by using infantry, in the main, to contend with the insurgent cavalry. As a consequence, the Spanish forces rarely, if ever, gained an advantage which they could follow up, but were continually exemplifying the myth of Sisyphus and the rolling stone.

The attorney for the Government, in the endeavor to screen Colonel Merrino from censure for impassiveness in the face of notice of the landing of the Roloff-Sanchez expedition, points to the fact that the forces he kept shut up idle in Sancti Spiritus at that crisis "were infantry," while those of the insurgents "*were all mounted*" (p. 46), failing to note, it would seem, that the contrast thus drawn involved an arraignment of the military authorities of the island for placing Spain's soldiery at such a disadvantage.

Referring to the possibility that if General Garrich had crossed the Zaza River and fallen upon Gomez, he and General Oliver might have captured the insurgent leader, the same learned counsel gave the military authorities of the island another thrust when he said: "But it is highly improbable that they could do that *with infantry while the insurgents were mounted*, and I have shown you that they left the country immediately on their horses, galloping away into Puerto Principe Province" (p. 56). So it was with another insurgent leader, as we learn from the same source: "They could not capture Maceo, because he was always on horseback, and Oliver was operating with infantry and artillery" (p. 49).

Again he said, that the testimony of the witness Pineiro showed "the activity of the insurgents, and also the activity of the Spanish pursuing columns, the one being mounted and *the Spanish troops on foot*" (p. 62). Is it a marvel, then, that the Spanish campaigns were little more than successions of indecisive conflicts with one or another insurgent rear guard?

The learned Assistant Attorney-General, at another time, admitted that the Spaniards were, on a certain occasion, outgeneraled; but then, he complacently added, the Spaniards were "*all infantry*," while "*the insurgents were on horseback*" (p. 67). It would seem that the counsel did not stop to inquire why it was that the Spaniards were

always handicapped in the race. Had he done so, he would have found no better reason, perhaps, than the fox hunter's—that if you want a good run the hounds must be held in the slips until the fox has gotten a fair start. In this way did Jeremy Bentham characterize the absurd technical advantages given the criminal by the English law.

Thus the learned counsel for the Government, in his zeal, thought he saw justification or excuse for Spain in a quarter where I have been able to discern nothing but gross and inexcusable negligence.

It was in his report of July 24, 1895, to the minister of war that Captain-General Campos drew this moving picture of the lot of the Spanish soldier trudging through mud, mire, and water in the vain endeavor to overtake his elusive and ubiquitous foe, the mounted insurgent:

It is pitiable to see them travel four days' journey without shoes, as the latter remain embedded or fallen to pieces in the roads, a third of the time with water up to the knees and up to the waist in the river fords, and making flanking movements in the woods. I do not think that any army excels in these virtues; some may be superior to our army in instruction—the fighting means—but a soldier like ours, who at times passes 4 days almost without food and drinking mud for water, it is difficult to find, and in stating these virtues to Y. E. I think that I am fulfilling a duty evidencing thanks and admiration for that soldier, and that I am giving Y. E., as superior chief of the army, a great satisfaction. (Reports of Captains-General, pp. 52-53.)

But these soldiers, so vaunted, were nevertheless allowed by their general to trudge and flounder in mud and water for many weary and disheartening months without hope of relief. Finally, the Captain-General in his report to the minister of war of December 30, 1895, did reveal that "*there are some who believe that we should mount the force.*" (Report, p. 129.) His rejection of the proposition shows that Campos was unfit to grapple with the situation, and his reasons for the course he took were far from convincing. They were as follows:

If I had good riders, with another arm than the sword, and they know how to handle it well, perhaps I would appeal to this means; but they (the insurgents) whenever a combat results unfavorable to them break ranks, and we can not do this, because apart from being disgraceful [it] would be very serious. (Report, p. 129.)

I fancy that nothing quite equal to this has occurred since Braddock scorned Washington's modest caution about Indian fighting. Both Braddock and Campos appear to be examples of hide-bound martinets who had buried their versatility in the "bookish theorick" of war.

Once aroused to a sense of the importance of having his force mounted, the wonder is that Campos did not mass the cavalry that were then scattered about in squads over the island, doing little if any good, and hurl it against the motley, ill-armed insurgent crew.

And here let me pause to say that Spain undoubtedly sent a great force into the island to put down the insurrection, but, like a circle

in the water, it was by broad spreading dispersed to naught. This weakness of Spain in the midst of her strength may be deduced from the testimony of the Government's witness, Valdez Sierra, who says:

All the towns had their garrisons, composed of a more or less number of troops, and, besides, on the road and in places where the revolution might operate, they had established forts—isolated forts—and which were rationed and ammunitioned by columns which passed by. (App., p. 245.)

It is hardly open to doubt that the hopelessness of the unequal contest with insurgent cavalry was an incubus on the Spanish soldiery, who naturally grew lethargic under it.

If General Garrich's force on the Zaza had been all mounted, is it probable that Gomez would have stolen a march and gained the right bank, or, if he had, that Garrich's pursuit would have been what it was—ignoble, and a travesty on warfare? It was a pursuit destitute of the hope that kept up the spirit of the tortoise in his race with the hare.

Like Leonidas at Thermopylæ, Garrich was charged with the immense responsibility of defending *at all hazards* the last barrier between Las Villas, with all the fatness thereof, and the consuming flame of the "Invasion." And what child's play he made of it, largely for the want of a mounted force! Campos, the directing head, like the Egyptian taskmasters, was continually demanding bricks without supplying the straw!

To go back to the beginning of the movement from the Orient, it has a great bearing on the question of Spain's diligence that Gomez, who was sent ahead to prepare the way for Maceo, was permitted to pass out of Santiago de Cuba and penetrate clear through El Camaguey into Las Villas without let or hindrance, not even at the Jucaro-Moron trocha.

And when Maceo followed after and came to Las Arenas, where he had been driven back once before by a Spanish force, he found no opposition whatever, the force whose duty it was to guard that strategic point under Colonel Nario having left it unguarded, incredible to relate, and gone to Victoria de las Tunas, a point some 15 or 18 miles distant, for rations. Of course, Nario went in pursuit in the vain endeavor to repair the mischief that had resulted from his neglect, and, having eased his conscience by making the usual rear-guard attack, deliberately gave up the chase and turned away to convoy a wagon train. A report followed, stuffed with fustian mixed with "epithets of war."

Bad as all this was, Nario could and, it is charitable to say, would have retrieved the day if his force had been all mounted.

But, perhaps, the worst instance of Spanish negligence was the permitting Maceo to pass through the great military barrier called

the Jucaro-Moron trocha with its line of forts, with strings of barbed wire between and an equipped railway running alongside practically the whole length, and garrisoned by some ten or twelve thousand troops of the three arms, with telephonic communication.

Yet Maceo, with only two thousand troops, poorly equipped, under cover of a feint and of darkness, slipped through this barrier so successfully that when, at break of day, he was discovered, all but his rear guard had crossed.

If the ten or twelve thousand men defending the trocha had been mounted, Maceo could have been crushed or crippled beyond repair. Instead of this, however, *he was not even pursued*, but allowed to proceed to the Zaza where, as we have seen, he and Gomez were to bring further reproach on the Spanish arms by eluding Garrich.

For this inefficiency and neglect the Government, in its brief, attempts an excuse which seems to confirm all that I have said in condemnation of Spain's violation of common sense in employing infantry to fight, as the brief has it, "*a leader who was a genius for his work, his men all mounted, with no artillery, baggage, or camp equipage, and ready to strike this line at any point, his force equal to from 2 to 4 miles in an emergency to the enemy's 1.*" The entire passage runs thus:

But given even, say, ten thousand men on a line 40 miles long, an average of five hundred men to the mile [*sic*], *these being mostly infantry*, with some artillery, with some twenty-odd forts to man and protect, some large and important stations, the entire force to be supplied from three or four important centers, *and given an enemy of two thousand, under a leader who was a genius for his work, his men all mounted, with no artillery, baggage, or camp equipage, and ready to strike this line at any point, his force equal to from 2 to 4 miles in an emergency to the enemy's 1.* Who doubts the ability of the leader of the two thousand men to cross that line in spite of all reasonable diligence and vigilance on the part of the opposing force, both daytime and nighttime?

(Brief, p. 32. Italics my own.)

In other words, the bulwark chiefly relied on to keep back the "Invasion" was indefensible against the "Invasion." But indefensible because manned, mostly, by infantry, who were as so many snails compared with their fleet-footed enemy.

There is something painful in this trifling with fate, this mockery of war as shown in the above quotation, when we reflect on the ruin and desolation that were to follow the passage of the trocha by the "Invasion."

The scene now shifts, showing the "Invasion" safely through the Sigüanea defile and fairly started on its mission of ruin, leaving, as usual, the Spanish behind in the lurch.

With such a lesson before him, how could Captain-General Campos longer fail to comprehend that "horses are quicker than men afoot?" His previous failure to accept the homely truth had rendered the strategy to entrap the "Invasion" at Sigüanea as vain as "the net spread in the sight of any bird."

In my view it no more transcends the judicial province to pass judgment on this fatal neglect which, it may be said without exaggeration, cost Spain her dominion in the island than it is to pronounce the opinion, which I now do, that much of the devastation caused by the insurgents could have been prevented but for the Spanish perversity in refusing to operate at night, which, for that very reason, became the chosen time for insurgent activity. The attorney for the Government, pressed for an excuse, said that Spain could not be expected to engage in *uncivilized warfare by fighting at night*—a reason which has a truly Arcadian flavor (p. 72).

The moment the "Invasion" had threaded the pass and crossed the Arimao, Hormiguero was doomed.

The destruction done to the property at this time was terrible and vandal-like, and was the work of the "Invasion" alone.

The question presented is, whether the United States, standing in the shoes of Spain, is liable for the damage thus done.

Tried by the standard of common sense, it seems difficult to escape the conclusion that Spain was inexcusably negligent in not mounting her forces and in relying mainly on her infantry. If she had failed to provide powder for her guns and made her fight with the bayonet, the sword, and the machete, her culpability could hardly have been more serious.

Was, then, this negligence of Spain the proximate cause of the damage done to Hormiguero by the "Invasion?" This is the question to be resolved.

An eminent authority has laid down that to make negligence the proximate cause of an injury "it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." (*Milwaukee, etc., Rwy. Co. v. Kellogg*, 94 U. S., 475.)

Did any official, from Campos down, doubt that precisely the things done at Hormiguero would be the natural and probable consequences of allowing the lawless "Invasion" to penetrate Las Villas and the provinces to west of it? Certainly Spain, if a defendant here, would hardly venture to say that she could not have foreseen such consequences "in the light of the attending circumstances."

As well might she make the same plea if she had, through negligence, permitted a savage beast to go at large and hope thereby to escape liability.

Having now developed, with an occasional digression, the point not heretofore raised, that Spain was delinquent in not mounting her forces, and, consequently, liable for the damage done to Hormiguero by the "Invasion," the object of this opinion is accomplished, it not being my purpose to open a fresh discussion of points already argued.

APPENDIX G.

[Opinion, No. 12.]

SPANISH TREATY CLAIMS COMMISSION.

MEETING OF THE COMMISSION,

On April 28, 1903, at which were decided certain demurrers in cases where damages were claimed on account of the reconcentration orders and for alleged violations by Spain of the treaty of 1795;

And at which was repeated the statement of principles of November 24, 1902, which was made in connection with certain demurrers in cases of damages done by the Cuban insurgents or the Spanish troops.

[The above announcements of November 24, 1902, and April 28, 1903, were reaffirmed December 5, 1903.]

STATEMENT OF THE COMMISSION.

The Commission states, as the principles by which it will be governed in passing upon the various demurrers which have been argued and submitted, the following:

1. Under Article VII of the treaty of Paris the United States assumed the payment of all claims of her own citizens for which Spain would have been liable according to the principles of international law. It follows, therefore, that the sole question before this Commission is that of the primary liability of Spain, which is not in any way enlarged by the agreement of the United States to adjudicate and pay such claims.

2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense which exempted the parent government from liability to foreigners for the acts of the insurgents.

3. But where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents.

4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed, from the first, beyond the control of Spain, and so continued until such intervention and war took place.

If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due

diligence might have prevented the damages done, Spain will be held liable in that case.

5. As war between Spain and the insurgents existed in a material sense, although not a state of war in the international sense, Spain was entitled to adopt such war measures for the recovery of her authority as are sanctioned by the rules and usages of international warfare. If, however, it be alleged and proved in any particular case that the acts of the Spanish authorities or soldiers were contrary to such rules and usages Spain will be held liable in that case.

6. As this Commission has been directed by Congress to ascertain and apply the principles of international law in the adjudication of claims of neutral foreigners for injuries to their persons and property caused by a parent state while engaged in subduing by war an insurrection which had passed beyond its control, it can not fail, in determining what are and what are not legitimate war measures, to impose upon the parent state such limitations as the consensus of nations at the present day recognizes as restricting the exercise of the right to remove all the inhabitants of a designated territory and concentrate them in towns and military camps and to commit to decay and ruin the abandoned real and personal property or destroy such property and devastate such region.

7. Adopting therefore a wide and liberal interpretation of the principle that the destruction of property in war where no military end is served is illegitimate, and that there must be cases in which devastation is not permitted, it should be said that whenever reconcentration, destruction, or devastation is resorted to as a means of suppressing an insurrection beyond control the parent state is bound to give the property of neutral foreigners such reasonable protection as the particular circumstances of each case will permit. It must abstain from any unnecessary and wanton destruction of their property by its responsible military officers. When such neutral foreigners are included in the removal or concentration of inhabitants, the government so removing or concentrating them must provide for them food and shelter, guard them from sickness and death, and protect them from cruelty and hardship to the extent which the military exigency will permit. And finally, as to both property and persons, it may be stated that the parent state is bound to prevent any discrimination in the execution of concentration and devastation orders against any class of neutral foreigners in favor of any other class or in favor of its own citizens.

8. Subject to the foregoing limitations and restrictions, it is undoubtedly the general rule of international law that concentration and devastation are legitimate war measures. To that rule aliens as well as subjects must submit and suffer the fortunes of war. The property of alien residents, like that of natives of the country, when "in the track of war," is subject to war's casualties, and whatever in front of

the advancing forces either impedes them or might give them aid when appropriated, or if left unmolested in their rear might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents; and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting.

If in any particular case before this Commission it is averred and proved that Spain has not fulfilled her obligations as above defined she will be held liable in that case.

9. It is the opinion of the Commission that the treaty of 1795 and the protocol of 1877 were in full force and effect during the insurrection in Cuba, and they will be applied in deciding cases properly falling within their provisions.

10. As to the first clause of Article VII of the said treaty, wherein it is agreed that the subjects and citizens of each nation, their vessels, or effects shall not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever, the Commission holds that whether or not the clause was originally intended to embrace real estate and personal property on land as well as vessels and their cargoes, the same has been so construed by the United States, and this construction has been concurred in by Spain; and therefore the Commission will adhere to such construction in making its decisions.

11. But neither this particular clause nor any other provision of the treaty of 1795 will be so applied as to render either nation, while endeavoring to suppress an insurrection which has gone beyond its control, liable for damages done to the persons or property of the citizens of the other nation when found in the track of war or for damages resulting from military movements unless the same were unnecessarily and wantonly inflicted.

MEMORANDUM OF APRIL 28, 1903.

The above propositions numbered from 1 to 5, inclusive, and the one numbered 9 were stated on November 24, 1902; the others, numbered 6, 7, 8, 10, and 11, are now announced for the first time. Each one of the eleven propositions is sustained by a majority of the Commission. Numbers 2 and 9 are concurred in by all the Commissioners. Number 10 is concurred in by all except Commissioner Chandler.

Commissioners Maury and Chambers on November 24, 1902, stated their dissent from propositions 1, 3, 4, and 5, and at this time state their views as to propositions 6, 7, 8, and 11, now for the first time announced.

[The Commissioners are William E. Chandler (President), Gerrit J. Diekema, James Perry Wood, William A. Maury, and William L. Chambers.]

MEETING OF APRIL 28, 1903—DEMURRERS IN CASES WHERE DAMAGES WERE CLAIMED ON ACCOUNT OF RECONCENTRATION ORDERS AND FOR ALLEGED VIOLATIONS OF THE TREATY OF 1795.

STATEMENT OF COMMISSIONER MAURY.

Propositions 6 and 7 are, in my judgment, misleading. They are addressed to the subject of the measure of diligence to which governments at war must be held, in order to escape liability to "neutral foreigners." But I apprehend that the question for us to consider first is the measure of diligence due by Spain to our citizens residing in Cuba as defined by the stipulations of the treaty of 1795 between Spain and the United States. That treaty imposed duties on Spain to our citizens in Cuba much more onerous than any imposed by the rules of international law. It is for this reason that I regard it as misleading to go to the institutes of international law for guidance instead of to the stipulations of the treaty, which should be the law of the Commission, so far as they go, and they go very far.

Proposition 8 announces, as a general principle of international law, that reconcentration is "a legitimate war measure." But I apprehend that the business of the Commission is not with this general proposition, but with the narrower one, whether reconcentration as practiced by General Weyler during the late insurrection in Cuba was "a legitimate war measure." Upon this proposition there would seem to be no room for doubt, for the Executive, in the performance of a constitutional duty to give Congress "information of the state of the Union," from time to time, and as the channel prescribed by the Constitution through which Congress and the judiciary shall obtain information of what concerns this Government in other countries, repeatedly condemned the reconcentration policy of General Weyler as cruel and uncivilized warfare, and it seems hardly open to doubt that Congress included that condemned policy among the "abhorrent conditions" mentioned in the preamble of the joint resolution of April 20, 1898, that brought on the war with Spain.

I can not accede to proposition 8, because it assumes the right of the Commission to rejudge the judgments of the political departments of the Government on the character of General Weyler's reconcentration policy in Cuba, a subject completely within their respective jurisdictions.

But, in my judgment, a discussion of reconcentration from the standpoint of international law is not necessary, on the further ground that all the cases involving that subject that have been before us on demurrer seem to come within the protection of the embargo clause of Article VII of the treaty of 1795.

Proposition 8 also lays down that aliens as well as subjects must suffer the fortunes of war, including the losses and injuries which follow reconcentration. This proposition, whether correct or not as to aliens generally, has no application to citizens of the United States, who had treaty rights and immunities in Cuba which they would not have had under the general law. Whether international law alone afforded a remedy against the condemned reconcentration policy of General Weyler is a question which, as I have just said, does not appear to be presented by any of the cases before us on demurrer.

Propositions 9 and 10 have my concurrence.

Proposition 11 I understand to be only a qualification of proposition 10. It withdraws from the protection of the "embargo or detention" clause of Article VII of the treaty of 1795 the property of our citizens, designated "neutral foreigners," embargoed or detained by Spain in enforcing any military measure for the suppression of the late insurrection in Cuba. In other words, proposition 11 refuses to give effect to the language of Article VII forbidding the "embargo or detention" of the property of our citizens "for any military expedition or other public or private purpose whatever," whereas the political department of our Government, which is charged with our foreign relations, has uniformly insisted that Spain was forbidden by this provision of the treaty from embargoing or detaining the property of our citizens in Cuba for any military measure or purpose whatsoever, and with such force of reasoning as to command the acquiescence of the Government of Spain.

It results, therefore, that the Commission, as a branch of the judicial department of the Government, declines to assent to the long-established interpretation put on the embargo clause of Article VII by the executive department, in disregard of the rule that each of the three departments of the Government is supreme within its circle of action. This rule preserves the equilibrium of the Constitution. As the Supreme Court has said, "One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." (*Sinking Fund cases*, 99 U. S., 700, 718.)

I am unwilling to subscribe to a proposition which, to my mind, invades the province of the executive department by declaring that, in the opinion of the Commission, that department has for the last thirty-odd years been pursuing a policy toward Spain for the protection of alleged treaty rights of our citizens which is void of support in the treaty.

Proposition 11, as I understand it, also withdraws from the protection of the embargo clause of Article VII our citizens, designated

"neutral foreigners," who sustained personal injuries at the hands of Spain as a part of the consequences of war or of being in "the track of war;" but if the above reasoning is correct as to the property of our citizens, it must be equally true as to any "embargo or detention" of their persons, for which, I apprehend, Spain was liable under all circumstances.

DISSENTING STATEMENT OF COMMISSIONER MAURY MADE IN CONNECTION WITH THE PROPOSITIONS ANNOUNCED BY THE COMMISSION ON NOVEMBER 24, 1902.

Commissioner MAURY. In disposing of the demurrers in these cases I have considered, in connection with the petitions demurred to, certain extraneous facts officially known to us, for the purpose of identifying the subject-matter upon which Article VII of the treaty of peace with Spain was intended to operate, and have reached the conclusion that by the phrase "all claims for indemnity * * * of every kind" in the article the High Contracting Parties intended to include all losses and injuries to the persons or property of our citizens resulting from the late insurrection in Cuba, the conditions of which our Government, through its executive department, declared to be abhorrent and shocking to the moral sense of the people of the United States and a disgrace to Christian civilization, presenting the spectacle of "a fertile territory wasted by fire and sword and given over to desolation and famine," where "anarchy, lawlessness, and terrorism *were* rampant," and where soldiers of Spain and the insurgents were alike engaged in spreading ruin and desolation, "making no discrimination between enemies and neutrals" and "utterly destroying American investments that should be of immense value" and "utterly impoverishing great numbers of American citizens."

In my view the propositions of law numbered 2 to 5, inclusive, on which a majority of my brethren have agreed, if correct, are abstract and not applicable to the conditions that characterized the late insurrection in Cuba, and I think all of them, except proposition 6, go far to defeat the object of Article VII of the treaty by establishing restrictions and qualifications as to the liability of the United States, which, in my judgment, could not have been in the minds of the parties when the treaty was signed. I must, therefore, withhold assent from the propositions in question.

An opinion in support of these conclusions has been prepared and will be filed at the proper time.

MEETING OF APRIL 28, 1903. DEMURRERS IN CASES WHERE DAMAGES WERE CLAIMED ON ACCOUNT OF RECONCENTRATION ORDERS AND FOR ALLEGED VIOLATIONS OF THE TREATY OF 1795.

STATEMENT OF COMMISSIONER CHAMBERS

As to propositions 6, 7, 8, and 11, now for the first time announced by the Commission.

The treaty of 1795 imposed upon both of the contracting nations obligations which, at the time of its enactment, at least, were in advance of international law in reference to the protection by either of citizens or subjects of the other, and their property, and while it is admitted as a general proposition that aliens as well as subjects must suffer the fortunes of war, this admission must be taken in connection with the stipulations of the treaty of 1795, which guaranteed the subjects and citizens of the contracting nations, respectively, a higher degree of protection, when within the jurisdiction of the other than that afforded by the general principles of international law, and greater in some respects and under certain conditions than the protection guaranteed to their own citizens or subjects. Therefore the stipulations in the treaty should be so applied as to hold Spain liable, while suppressing the insurrection, for damages done to persons and property of American citizens, unless it be shown that in the employment of military force the acts which resulted in damages were necessary and justifiable according to the rules of civilized warfare.

The removal of noncombatant people temporarily to places of safety beyond the sphere of actual warfare need not necessarily be illegitimate warfare. The Government, however, that adopts reconcentration as a war measure must be presumed to have foreseen all its consequences, and undoubtedly assumes responsibilities and incurs liabilities which the nature of the reconcentration, its execution, and results alone can determine. But the subject is purely an abstraction as far as this forum is concerned. Whether the reconcentration in Cuba was civilized warfare is not an open question for this tribunal. The political department of our Government having decided that the reconcentration, which Spain undertook to justify as a necessary measure of war, was not civilized warfare, this Commission is bound to so hold; and applying the particular stipulations of the treaty of 1795 now under consideration to the consequences of such uncivilized warfare, Spain should be held liable for the injuries and destruction of property that occurred in the depopulated and devastated regions during the continuance of the reconcentration.

Views of Commissioner Chambers as to propositions 1, 3, 4, and 5, as embodied in dissenting statement of November 24, 1902, when those principles were first announced.

“*Prima facie*, a nation is responsible for all acts or omissions taking place within its territory by which the citizens of another State are injuriously affected,” and a nation which does not prevent its citizens from injuring foreigners or damaging their property incurs responsibility, upon the principle that the offending citizens, being under its authority, it is obliged to watch over them and see that they do no injury to anyone.

But this *prima facie* presumption of responsibility for injuries done to foreigners, which a State is called upon to rebut, may be said to end in the case of insurrection or rebellion, when the parent State has exhausted all its resources, and when the insurrectionary movement has reached such a stage that the regularly constituted authorities of the titular government are powerless to prevent such injury; or when the acts complained of have been committed by that part of the population which has broken loose from control and established for itself a status among nations, which imposes upon it the international relations and responsibilities which would have continued to exist as to the titular government if there had been no breaking loose.

It is a question of fact, to be determined by proof in a given case, (1) when the insurrection reached such a stage, (2) whether, notwithstanding the insurrection had, in a general sense, gotten beyond control, the titular authority, still asserting sovereignty, could or could not have prevented the injuries done at a particular time and place, and (3) when a part of the population had broken loose from control, and established for itself an international status.

The status of a government in reference to foreign affairs—such, for instance, as the conditions that existed in Cuba between February, 1895, and April, 1898—is determined by what the Executive Department refuses to do, as well as by its affirmative movements. And in the employment of judicial knowledge we are bound to know what the status of our Government was.

This is a national court, although charged with applying the principles of international law to a subject-matter lying beyond the geographical limits of the United States, and is bound, in its interpretation of those principles, by the decisions of the Supreme Court.

The political department of the Government having determined that the struggle in Cuba was not a war in the legal or international sense, and that even as an insurrection it was not conducted according to civilized methods, and having declined to recognize the rebels as belligerents for the reason, among others, that by so doing American citizens would be deprived of the right to claim indemnity of Spain

for injuries and losses, this court, following the authority of the Supreme Court, can not otherwise determine.

It can not be assumed on demurrer that the destruction of property of an American citizen by the Spanish troops was one of those necessary incidents of war which relieved the destroyer from liability, and the burden is upon the defendant to prove that the destruction was a necessary war act, justifiable according to the rules of civilized warfare.

I concur in the general principles announced in the dissenting statement of Commissioner Maury, with the qualification that it still remains open to the defendant to limit or relieve itself from liability by proof that in a particular case the Spanish authorities, asserting sovereignty and control, were actually attempting to protect and failed in doing so because they were then and there unable to prevent the injuries complained of.

THE MEASURE OF LIABILITY ASSUMED BY THE UNITED STATES UNDER ARTICLE VII OF THE TREATY OF PARIS.

OPINION OF COMMISSIONER WOOD.

Commissioner WOOD. A fundamental issue raised in the argument of these demurrers presents the question of the measure of liability assumed by the United States for the payment of claims of its citizens as provided by the treaty of Paris. It is contended by counsel for some of the claimants that by the terms of the treaty the Commission is relieved from adjudicating these claims according to the principles of international law ordinarily applied to claims of like origin for the reason that the language of Article VII of the treaty contemplates the payment of all claims of every kind, presented and unrepresented, of citizens of the United States, that may have arisen prior to the exchange of ratifications of the treaty:

The claims, it is urged, are to be paid regardless of the question whether or not Spain was primarily liable for their payment under international law. In other words, the contention is that Article VII is a special agreement on the part of the United States with Spain to indemnify all American citizens for injury to their persons or property growing out of the late insurrection in Cuba, whether or not such claims, in the absence of the treaty, could have been successfully prosecuted against the Government of Spain.

On the other hand, counsel for the Government take the position that by the terms of the treaty the United States assumed only those obligations for which Spain would have been liable under international law.

Article VII reads as follows:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late insurrection in Cuba, and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

In determining the meaning of this provision of the treaty it is profitable to review the attitude of both the United States and Spain toward these claims prior to the war between the two nations.

During the late insurrection in Cuba the United States repeatedly called the attention of Spain to losses incurred by American citizens growing out of the armed hostilities in the island, and from time to time submitted statements of losses, more or less specific. In no case, however, did this Government make demand for indemnity regardless of the merit of the claim or its justice as measured by the well-established law of nations; and while the Executive Department made use of the strongest terms in condemnation of the methods of warfare and the abhorrent conditions which characterized the hostilities in Cuba and the sufferings and losses of our citizens caused thereby, yet there is not to be found an instance where the position is taken that Spain was to be held to an unlimited responsibility for losses resulting from those conditions, or a sentence from which it can be inferred that such an accounting would be exacted. On the contrary, when expression is given to the obligation to indemnify, care is taken to expressly state the rule of law by which such obligation was to be determined. Barring a few exceptional cases, Spain was not even charged with liability. The claims were merely presented for the consideration of the Spanish Government, with the express statement on the part of our Government that their presentation carried with it no imputation of obligation to pay.

As early as July 1, 1895, the Department of State indicated the rule of liability as to damages done by insurgents. On June 13, 1895, three naturalized citizens of Sancti Spiritus wrote to Consul-General Williams, as follows:

We, the undersigned, American citizens and property holders in several municipal districts of this island, having received intelligence that the insurgents have forbidden the extraction of cattle from the farms; and, furthermore, seeing through the newspapers the wanton destruction of property throughout the island, with marked tendencies to anarchy, apply to you for information on the following points, viz:

Have we the right to apply to the Spanish authorities for such forces as would be required to safely conduct our cattle to the nearest market?

Should the Spanish authorities deny our request, what shall we do?

In what form are we to protest, and under what circumstances can we make good our claims to damages?

We furthermore understand that in certain cases the insurgents have threatened to destroy property unless a certain bounty is paid. What are we to do in case such a threat is made to us?

We would be thankful for full information, if possible, through the Department of State, on these subjects, and with much respect, etc.

(For. Rel. U. S. 1895, p. 1215.)

This communication was forwarded to the State Department by Vice-Consul-General Springer, who, in an accompanying letter, after stating the substance of the above communication, says:

The parties desire to receive full information on this point from the Department of State, to which I respectfully refer their letter. * * * A number of questions of

the same tenor have been verbally made to this office by naturalized citizens residing and holding property in this island, and it is desirable to have the instructions of the Department on the subject in order to give to such an authoritative answer. (Ibid.)

Mr. Uhl, the Acting Secretary of State, in his reply of July 1, 1895, to Vice-Consul-General Springer, said:

Your dispatch, No. 2517, of the 19th instant, has been received. You therewith forward copy of a letter received by you from three Cuban landowners, American citizens, and residents of Sancti Spiritus, making inquiries concerning the protection of their property from seizure or destruction by insurgents. In particular, the writers state that they have learned that the insurgents have forbidden the removal of cattle from the farms, and ask if they have the right to apply to the Spanish authorities for the protection of their property in conducting their cattle to the nearest market, and, in case of refusal, under what circumstances and in what form they can make protest for damages.

It is a generally accepted principle of international law that a sovereign government is not ordinarily responsible to alien residents for injuries they may receive within its territories from insurgents whose conduct it can not control. Within the limits of usual effective control, law-abiding residents have a right to be protected in the ordinary affairs of life and intercourse, subject, of course, to military necessities, should their property be situated within the zone of active operations. * * * In the event, however, of injury, a claim would necessarily have to be founded upon averment and reasonable proof that the responsible officers of the Spanish Government, being in a position to prevent such injury, have failed to use due diligence to do so. It is impossible to give more precise instructions upon the hypothetical case presented. Should injury be actually suffered and the facts be fully represented, this Department would be in a position to determine its duty, if anything, in the premises. (Ibid.)

A more specific statement of the character of the obligation imposed upon Spain toward American citizens residing in Cuba is stated in the official communication from Secretary Olney to Minister Taylor, at Madrid December 29, 1896. Many complaints preferred by American citizens in Cuba for injuries to their persons and property had, from time to time, through Minister Taylor, been submitted by the State Department to the Government of Spain, with the statement that:

The facts set forth as regards these claims indicate that the rights granted by international law and by treaty to citizens of the United States residing in Cuba have not been observed by the Spanish authorities in that island. It is hoped that the Spanish Government will give them as early consideration as is practicable and take measures to prevent any further infraction of the rights of our citizens who may be within its jurisdiction.

In his answer the Duke of Tetuan denied liability on the part of Spain for payment of these claims. To this denial Mr. Olney, through Mr. Taylor, replied as follows:

Your dispatch No. 614 of the 15th instant, inclosing copy of a note from the Duke of Tetuan in relation to the claims against Spain mentioned in the Department's No. 575 of September 21 last, has been received.

The Duke of Tetuan denies obligation to pay any of these claims, on the ground that the damage was done by Cuban insurgents. You are requested to say in reply,

pursuant to instruction No. 620, of the 4th instant, that no demand for payment has been made upon any of the claims referred to, but that you were simply instructed "to inform the Spanish foreign office that the following claims against the Spanish Government had been presented to the Department by persons residing or owning property in Cuba and claiming the protection of the United States."

As Spain has not been called upon to pay or to acknowledge obligation to pay these claims, the general denial of obligation to pay them or to inquire into the facts upon which they are based, made by the Duke of Tetuan, is at this stage premature and inadmissible.

At the proper time all the Cuban claims of which Spain has been given notice, but which she has not been called upon to pay, will be examined, each upon its individual merits, and dealt with according to the law and the facts as they appear to this Government. To such as may be then presented, with all the facts attainable, for payment by Spain, that Government will be at full liberty to make such defense as it may deem proper. At this time the United States can not consider the question of their validity nor assent to any proposition of law as affecting or having any possible bearing upon the rights of the claimants. With respect to these unrepresented claims everything is reserved.

Again, Mr. Sherman, in an official note to Minister de Lome July 6, 1897 (For. Rel. 1897, p: 516), relative to claims of American citizens, says:

This Government can not admit that the responsibility of Spain for the protection of American property within the sphere of Spanish control is to be measured by any other test than that of actual ability so to protect it. To be able to protect and yet to refuse protection upon a self-formulated pretext can not, in the view of this Government, exempt that of Spain from its just liabilities in the premises should injury to American rights result from removal of protection.

The letter of Secretary Olney above recited negatives the argument that up to that time the claims were presented to Spain for any purpose other than to advise that Government that such claims had been filed with the State Department at Washington. Spain was "not called upon to pay or to acknowledge obligation to pay these claims." They had not yet been examined by the State Department. Spain was further advised that all the Cuban claims would be examined, "*each upon its individual merits*, and dealt with according to the *law* and the *facts*," and that after examination such claims as this Government should regard as meritorious *would then be presented*, "with all the facts attainable, for payment by Spain, with the full liberty on the part of that Government to make such defense as it may deem proper."

This, and in fact all state papers bearing on the subject, recognized well-defined principles of international obligation, and Spain was notified that those principles would be regarded and upheld in the settlement of claims preferred by citizens of the United States.

The Commission is unable to discover that the United States Government subsequently changed this well-grounded position either arbitrarily or by agreement with Spain.

Much stress is laid on the expression of the President in his message of April 11, 1898, to Congress, which reads:

We owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection.

By this utterance of the President, it is urged, the claims for indemnity of American citizens for losses incident to the insurrection were made a distinct ground for war with Spain, and that it follows that this Commission is bound by the settlement of this issue through the arbitrament of war. Furthermore, that it was the basis for the agreement to pay all claims as provided by Article VII.

It can not be gainsaid that the pillage and devastation of American property in Cuba and the sufferings of our citizens as a result of the war methods adopted by both Spain and the insurgents contributed in a large measure to the "abhorrent conditions" which brought about the armed intervention of the United States, and that these injuries, whether wanton or justified by the exigencies of war, were in the mind of the President when he made use of the language above quoted, as were conspicuous instances of devastation and injury to which the attention of Spain had been called and redress demanded where "Spain had failed to perform her treaty obligations and other international duties to the United States" and "American citizens had been seized and imprisoned without shadow of right and had been proceeded against by violent and irregular forms in violation of treaty obligations."

But the language of the above reason for intervention is not, in the judgment of the Commission, susceptible of the broad construction insisted upon by counsel, to wit: That by its terms the President charged Spain with liability for all injuries to the persons and property of American citizens growing out of the insurrection, and submitted this charge as an issue to be decided by the result of war declared against Spain. Such a construction can not be gathered from the language used by the President. Such a position would have been inconsistent with the former attitude of the Government toward these claims, for, as has been said, the United States, save in a few extraordinary cases, made no demand of Spain for payment of claims, and gave the latter Government assurance that the merits of all claims submitted for consideration were to be finally determined according to the facts and the law. A careful consideration of the language leads to the conclusion that the demand for "protection and indemnity" mentioned related more to the future protection of American citizens in Cuba than to redress for past grievances suffered by them.

For three years their plantations had been the theater of strategic war, devastated alike by Spanish soldiers and insurgents, the owners in many instances being powerless to interfere or give protection by reason of their enforced abandonment of their properties. This was

a natural sequence of the ruinous warfare raging over the island. "Spain either could not or would not afford protection." Therefore the President justly said this Government could no longer see its citizens despoiled of their property without hope of redress, and there was left open but one way to restore the property to the owners and protect them in its use and that was "to terminate the conditions that deprive them of legal protection;" that is, deprive Spain of her sovereignty over Cuba and establish there a stable and responsible government that would be a guaranty of protection to the persons and property of our citizens.

The above recited acts of this Government relative to losses of American citizens, in the opinion of the Commission, demonstrate that at no time before the preliminary peace protocol was it the intention of our Government to insist upon the unqualified responsibility of Spain in all cases where American citizens suffered injury to person or property, but in only those cases where the injuries were the result of Spain's violation of her international obligations.

Turning to the negotiations resulting in the treaty of peace, nothing is to be found in the correspondence between the two Governments that expresses or implies a change on the part of the United States in its attitude toward Spain's obligation to indemnify American citizens. No such change can be fairly inferred, as claimed by some counsel for claimants, from the statement by the Secretary of State in his note to the Duke of Almodavar del Rio that "The President can not be insensible to the losses and expenses of the United States incident to the war, or to the claims of our citizens for injuries to their persons and property during the late insurrection in Cuba," and the consequent demand for the cession of Porto Rico and other Spanish territory. There is not in this language an intimation that the President would demand the payment of these claims *in toto* without inquiring into their legal status as binding obligations upon Spain.

The language used was no broader than had been often made use of by the State Department in notifying Spain of the complaints filed by United States citizens, and it is reasonable to presume the language carried with it the same qualification made by Secretary Olney to the Duke of Tetuan as to the measure of liability.

This presumption is strengthened by the fact that there is nowhere to be found in the peace negotiations, nor in the correspondence between the Executive and our Peace Commissioners, a suggestion in terms to the effect that all citizens who suffered loss or injury were to be indemnified.

This expression of the President was embodied in the instructions to the American Peace Commissioners and the consideration of the claims, national and individual, resulted in the adoption of Article VII of the treaty of peace.

While the consideration for the cession of territory by Spain to the United States nowhere appears in the treaty of Paris, yet it is fair to say that the satisfaction of claims of American citizens was a part thereof, but clearly a small part when it is considered that the cost of the war was \$300,000,000 and Spain was paid the sum of \$20,000,000. But had the consideration been great or small, or even if there had been no consideration, the obligation of this Government to pay the relinquished claims would have been the same. Nor does the amount of the consideration in anywise determine the character of the claims to be paid. And if, as urged by counsel, the United States, having received territory as a consideration for the relinquishment of the claims, became a trustee for claimants, it does not follow that this Government is either legally or morally obligated to pay all losses suffered by its citizens in Cuba unless it appears that it was so intended by the contracting nations. The trust imposed must be measured by the obligation assumed, to wit, an agreement to "adjudicate and settle" the claims relinquished.

In the light of the foregoing, and, indeed, in reading the treaty provisions unaided by the extrinsic facts and circumstances, it would seem that it was the intention of the treaty makers in adopting Article VII that the contracting Governments should renew their national relations with clean balance sheets. To that end the United States released Spain from the further consideration of or responsibility for any and all claims, national or individual, made, or which might thereafter be made, by this Government in behalf of itself and its citizens against Spain, growing out of the Cuban insurrection, and assumed the same responsibility to which Spain would have been held in the absence of the treaty. The word "claims" as used in Article VII does not in the judgment of the Commission mean vested rights, but is used in its primary sense as meaning "demands of rights or supposed rights," and the expression "all claims * * * of every kind" was obviously used to make it clearly appear that neither Government was thereafter to be called upon to consider any demand theretofore made or that should thereafter be made upon it by the other Government or its citizens or subjects for losses accruing within the time prescribed.

This construction of Article VII is sustained by the consideration that it is difficult to conceive that Spain, in view of her attitude toward these claims from the beginning, and the significance their allowance or disallowance bore to the method of warfare in Cuba, would, without protest or explanation, have agreed to or acquiesced in a proposition which could only be construed as an acknowledgment that the conduct of that nation in her attempt to suppress the insurrection was a continuous violation of the rules of civilized warfare, and was characterized by such gross neglect of duty and wanton cruelty as to deprive her of every defense to any and all charges of persecution and depredation preferred by American citizens in Cuba.

By a provision of the same article the United States agreed to "adjudicate and settle" these demands or claims for indemnity made by American citizens against Spain. If all of these claims must be paid no issue could be raised calling for an adjudication on their merits so far as the application of legal principles is concerned. All that would be required of the Commission would be an accounting and payment to the right persons of losses without reference to their legality or illegality under international law.

This same issue arose before the domestic tribunal created pursuant to the treaty of 1819, between the United States and Spain, under conditions practically the same as those presented by the treaty of 1898 and the act of Congress to carry out its provisions. By Article IX of the former treaty the contracting parties mutually renounced "all claims for damages which they themselves, as well as their respective citizens and subjects," had suffered prior to the date of its signature; and in order that there might be no doubt as to what this engagement comprehended, it was declared that the renunciation of the United States would extend—

1. To all the injuries mentioned in the convention of 1802, which was declared to be annulled.

2. To all claims on account of prizes made by French privateers, and condemned by French consuls, within the territory and jurisdiction of Spain.

3. To all claims of indemnities on account of the suspension of the right of deposit at New Orleans in 1802.

4. To all claims of citizens of the United States upon the Government of Spain arising from the unlawful seizures at sea and in the ports and territories of Spain or the Spanish colonies.

5. To all claims of citizens of the United States upon the Spanish Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State, or to the minister of the United States in Spain, since the date of the convention of 1802 and until the signature of the present treaty.

By Article XI of the treaty the United States, exonerating Spain from all demands for the American claims that had been renounced, undertook "to make satisfaction for the same to an amount not exceeding five millions of dollars," and for this purpose to appoint a commission of three citizens of the United States which should, within three years from its first meeting, "receive, examine, and decide upon the amount and validity of all the claims included within the description above mentioned." The article further provided:

The said commission shall be authorized to hear and examine, on oath, every question relative to the said claims and to receive all suitable authentic testimony concerning the same. And the Spanish Government shall furnish all such documents and elucidations as may be in their possession for the adjustment of the said claims, according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties of 27th October, 1795. (Moore's International Arbitrations, vol. 5, p. 4487 et seq.)

The issue was raised before that commission as to the extent of the obligation assumed by the United States under Article XI as applied to the fifth renunciation, above recited, of Article IX. The decision is found in the final report of the commission, as follows:

In determining what cases were embraced within the renunciations of the ninth article of the treaty aforesaid, the Commission has seldom found much difficulty except in relation to those which were supposed to be provided for by the fourth and fifth. In relation to the last, the Commission adopted the following principles: That it was not sufficient to entitle an applicant to the benefits of this treaty for him to assert and show that, being a citizen of the United States, he had presented a statement of his claim upon the Spanish Government to some of the functionaries therein mentioned and within the time prescribed, soliciting in such statement the interposition of the Government of the United States. The failure to have presented such a statement to such officers within the time prescribed was considered as a sufficient cause to justify and require the rejection of all claims that were not provided for by any other of the renunciations than the fifth; but to bring such claims within the provisions of this renunciation it was necessary to show that the claim which had been so presented was in itself a *good* claim. And in deciding upon the character of such claims the Commission has considered none as good, but such as the Spanish Government ought to have satisfied if this treaty had never been concluded. And in determining upon the liability of the Spanish Government under such supposed circumstances the Commission have uniformly taken as their guide the laws of nations and the stipulations of the treaty concluded between the United States and Spain on the 27th of October, 1795. (Moore's International Arbitrations, vol. 5, pp. 4487, 4512.)

An examination of this treaty of 1819, as to the renunciation, satisfaction, and adjustment of claims discloses a striking similarity to the provisions of Article VII of the treaty of 1898 as supplemented by the act of Congress to carry out those provisions.

In the one case, *all presented claims* (under the fifth renunciation) were relinquished to Spain, with an agreement by the United States "*to make satisfaction of the same,*" and the claims so relinquished were "*to be adjusted according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties of 27th October, 1795,*" while by the treaty of 1898 the United States relinquished to Spain "*all claims of every kind*" of its citizens and agreed to "*adjudicate and settle*" the claims so relinquished; and Congress has directed that they shall be adjudicated according to the merits of the several cases, the *principles of equity* and of *international law*.

Again, in the Van Ness convention of 1834 between the United States and Spain for the settlement of claims, it was by Article III agreed as follows:

The high contracting parties, in virtue of the stipulation contained in article first, reciprocally renounce, release, and cancel all claims which either may have upon the other, of whatever class, denomination, or origin they may be, from the 22d of February, 1819, until the time of signing this convention. (Treaties and Conventions between United States and other Powers, p. 1023.)

There is no provision in the treaty directing an adjudication of the claims relinquished by the two Governments.

By act of Congress, June 7, 1836, the President was directed to "appoint one Commissioner, whose duty it shall be to receive and examine all claims which may be presented to him * * * which are provided for by the said convention, according to the provisions of the same and the *principles of justice, equity, and the law of nations.*" It was made the duty of the Commissioner to report to the Secretary of State a list of all the several awards made by him.

The following extracts are taken from his report:

In the examination of memorials, the facts stated therein, and verified by the affidavit of the claimant, were assumed by him (the Commissioner) to be true. If the case presented by the memorial was embraced by the renunciations of the third article of the convention of the 17th February, 1834, unless a strong doubt existed, the memorial was received; otherwise it was rejected.

This course involved the necessity of settling the proper construction of that article as to what claims were to be considered as comprehended within its renunciations.

By the third article Spain and the United States reciprocally renounce *all claims* which either may have upon the other, of *whatever class, denomination, or origin* they may be, from the 22d February, 1819, until the time of signing the convention. No enumeration of these claims is afforded by the treaty. Language thus broad and comprehensive admitted of the greatest latitude of interpretation, and admonished the undersigned of the high responsibility involved in affixing to it a legitimate construction.

This question occasioned to him the most serious embarrassment, as upon its right determination must depend the fact whether the fund obtained under the convention from Spain should prove available or delusive as an indemnity to rightful claimants, or be frittered away among the mass of illegitimate pretenders.

That a general error existed in the public mind as to the right construction of the third article was evident to the undersigned from the very miscellaneous character of the claims preferred for his consideration—presenting every imaginable shade of grievance and injury, whether springing from contracts, spoliations, or the enforcement of Spanish municipal laws. This error, no doubt, had its foundation in the latitude of phraseology employed in the third article, undefined by any specification of the renunciations it was meant to embrace.

The undersigned is aware that he must have disappointed the hopes of many confident claimants, in determining, as he did, to place a restrictive interpretation upon this article. On this, however, as upon all other questions of doubt, involving principles of decision, the undersigned took as guides to a right judgment the laws of nations, the stipulations of treaties between the United States and Spain, and the correspondence between the two Governments, which led to the conclusion of the convention, as far as they were applicable to the cases before him, and never permitted himself to range in the wide field of unrestricted opinion. This course was dictated not only by a just distrust of his own judgment, but by the more important consideration, that he was unaided by the arguments of counsel, or by the cooperation of an assistant commissioner, and that there was no appeal from his decisions.

The construction adopted by the undersigned restricted the broad language of the third article to the recognition of such cases only as would have formed valid reclamations against Spain, on the part either of the United States or her citizens, had the convention of the 17th of February, 1834, never been concluded.

To establish, therefore, the validity of a claim, it was necessary to show that the aggrieved party was a citizen of the United States, and entitled to the protection of

his Government, at the time of the wrong complained of; that the claim had never become the property of a foreigner, by which its natural character was considered as forever forfeited; that the wrong complained of was a clear violation of the laws of nations or of treaty stipulations between the United States and Spain; that it was authorized by Spain, or directly sanctioned by her authorities, civil, military, or judicial; that the injury was not the loss of *expected gains*, and that the claim remained in full force against Spain at the date of the convention of the 17th of February, 1834. (Moore's International Arbitration, p. 4542.)

If any doubt exists as to what was intended by the provisions of Article VII of the treaty of Paris at the time of its adoption, this Commission must be governed by the construction put upon it by Congress by the act of March 2, 1901, entitled "An act to carry into effect the stipulations of article seven of the treaty between the United States and Spain concluded on the tenth day of December, eighteen hundred and ninety-eight." The first section reads:

The President of the United States shall appoint, by and with the advice and consent of the Senate, five suitable persons learned in the law, who shall constitute a commission, whose duty it shall be, and it shall have jurisdiction, to receive, examine, and adjudicate all claims of citizens of the United States against Spain, which the United States agreed to adjudicate and settle by the seventh article of the treaty concluded between the United States and Spain on the tenth day of December, anno Domini eighteen hundred and ninety-eight. It shall adjudicate said claims according to the merits of the several cases, the principles of equity, and of international law.

The language thus used fixing the duties of this Commission is plain and unmistakable.

"It shall adjudicate said claims according to the merits of the several cases, the principles of equity and of *international law*." Not only does this language prescribe the rule which must govern the Commission in the trial of cases, but convincingly shows that Congress regarded these claims as international in character and their status as unaffected by the treaty.

Sections 9 and 10 of this act provide for the practical and effective application of these legal principles. Section 9 reads:

That every claim prosecuted before said Commission shall be presented by petition, setting forth concisely and without unnecessary repetition the facts upon which such claim is based, together with an itemized schedule setting forth all damages claimed. Said petition shall also state the full name, the residence, and the citizenship of the claimant, and the amount of damages sought to be recovered, and shall pray judgment upon the facts and law.

Section 10 provides that the petition shall be served upon the Attorney-General of the United States, whose duty it shall be to defend the interests of the United States, and that he shall * * * file a demurrer or answer to said petition."

Another section provides for the appointment of an additional attorney-general and such assistant attorneys as the business of the Commission may require, to appear and defend the United States in all proceedings to adjudicate claims which may be had before the Commission.

By an amendatory act passed June 30, 1902, Congress provided that in the prosecution of cases before the Commission the "rules and modes of procedure shall conform, so far as practicable, to the mode of procedure and practice of the circuit courts of the United States."

It is further provided that—

The said commission created by this act is vested with the same powers now possessed by the circuit and district courts of the United States to compel the attendance and testimony of parties, claimants, and witnesses, to preserve order, and to punish for contempt, and to compel the production of any books or papers deemed material to the consideration of any claim or matter pending before said commission.

That the said commission is also vested with all the powers now possessed by the circuit and district courts of the United States to take or procure testimony in foreign countries. Such testimony may be taken, pursuant to the provisions of existing laws and the rules and practice of the district and circuit courts of the United States, so far as applicable, before the commission or any commissioner or commissioners appointed under the provisions of this act.

That the marshal of the United States for the District of Columbia, or his deputies, shall serve all processes issued by said commission, preserve order in the place of sitting, and execute the orders of said commission; and outside of the District of Columbia the writs of said commission shall be executed by United States marshals, or their deputies, in their respective districts.

Thus, it will be noted, these acts provide for all the pleadings and procedure ordinarily incident to the trial of cases before judicial tribunals. Congress having enacted such comprehensive and careful measures for the prosecution and defense of these claims, it is impossible to accept the view that it was intended that all claims were to be paid, without regard to the circumstances of their origin, so long as the claimants are shown to be American citizens, and their injuries or losses to have occurred in Cuba within the prescribed time.

It is to be observed that section 9, above quoted, requires the claimant to state in his petition his name, residence, and citizenship, amount sought to be recovered, and an itemized schedule of damages. If the United States is to be held to an unqualified liability for damages done to her citizens growing out of the Cuban insurrection, nothing of substance would have to be added to these averments to make a complete petition. But Congress has said in the same section that in addition to those facts the claimant must state "*the facts upon which his claim is based*," and "pray judgment upon the *facts and the law*." In the opinion of the Commission these requirements impose upon the claimant the necessity to concisely state in his petition the specific facts of his loss or injury, setting forth when, by whom, and under what circumstances such loss or injury occurred. In other words, the claimant is required to state facts which entitle him to recover according to the principles of international law, it having been made incumbent upon the Commission by section 1 to adjudicate claims according to those principles.

It is worthy of note that Congress in providing for the adjudication of claims "according to the *merits* of the *several cases*, the principles of equity and of *international law*," and that "claimants shall pray judgment on the *facts and the law*," recognizes the same rule of liability, and in nearly the same language, enunciated by Secretary Olney, in advising the Duke of Tetuan that all of the Cuban claims would be examined "each upon its *individual merits* and dealt with *according to the law and the facts*."

That Congress anticipated that most important legal principles would be involved in the trial of the claims before the Commission is shown by the provisions of section 13 of the act above referred to, which reads:

When the Commission is in doubt as to any question of law arising upon the facts in any case before them they may state the facts and question of law so arising and certify the same to the Supreme Court of the United States for its decision, and said court shall have jurisdiction to consider and decide the same.

It does not seem reasonable that Congress should authorize a reference to the highest judicial tribunal of the land of questions of law that might possibly grow out of issues incident to the mere auditing of these claims. It is clear that it had in mind the greater questions of international law involved in the adjudication of international claims and to be applied in the trial of cases before this Commission, and by which the Commission is to determine the liability of the United States Government on the basis that it has assumed by Article VII of the treaty of Paris the original liability of Spain to the claimants.

The Commission adopts as a succinct statement of the obligation of the United States relative to these claims the language of one of the eminent counsel for claimants and a recognized authority on international law:

It is obvious that the Commission is to consider the claims precisely as if they still constituted subsisting demands against the Government of Spain; for, although the United States has undertaken to "adjudicate and settle" them, they remain in their nature international, and are to be tried by the principles by which the liability of independent nations, one to another, is governed. And Congress has therefore prescribed that the Commission "shall adjudicate said claims according to the merits of the several cases, the principles of equity and of international law." (Brief of John Bassett Moore, Case No. 196, The Constancia Sugar Co.)

Other distinguished counsel for claimants state the same proposition in this language:

The statute constituting this tribunal rightly prescribes: "It shall adjudicate said claims according to the merits of the several cases, the principles of equity and of international law." But the tribunal, in so passing upon the claims, can not ignore the fundamental fact that the real controversy here, whatever may be the attitude of the Attorney-General, is a controversy between two States—the United States on the one hand, whose citizens have been injured, and Spain on the other, which is

responsible for the injury. The Commission is to determine primarily the questions, what amount Spain should have paid to the United States for each of these claims had the United States not assumed their payment. (Brief of James Russell Soley, Frank H. Platt, of Counsel, Case No. 11, Teresa Joerg et al.)

The Commission decides that under Article VII of the treaty of Paris the United States assumed the payment of all claims of her own citizens for which Spain would have been liable according to the principles of international law. It follows, therefore, that the sole question before this Commission is that of the primary liability of Spain, which is not in any way enlarged by the agreement of the United States to adjudicate and pay such claims.

STATE OF WAR.

OPINION OF COMMISSIONER DIEKEMA.

Commissioner DIEKEMA. Counsel for the Government contend that a state of flagrant war in the international sense existed in Cuba from February, 1895, to April, 1898, and that under the established usages of international law a nation can not be held liable for foreign-owned property destroyed by the public enemy within her borders during a state of war.

They ask the Commission to take judicial notice, from an examination of what they term the incontestable facts of history during the above period, that such a state of war existed, claiming that such an examination must lead to the conclusion that the revolution in Cuba possessed all the indicia of a state of war within the definition of international law.

They assert that this Commission has the power to inquire into the internal condition of Cuba during the revolt, and to determine whether the parties were belligerents or enemies in the international sense, or whether the condition was that of an armed rebellion merely.

Counsel for claimants admit that if belligerency, or a state of war in the international sense, actually existed in Cuba during the time above specified Spain would, as a general rule, be exempt from liability to foreigners for the acts of the insurgents; but they contend that this Commission can not inquire into the internal condition of Cuba during the revolt for the purpose of determining whether a state of belligerency, as distinguished from sedition or armed revolt, existed there or not; that we must follow the political departments, and recognize only what those departments recognized; and that the scope of our investigations can not extend beyond the question whether the political departments of our Government or of the Government of Spain ever granted to the insurgents belligerent rights.

The Commission is satisfied, from an examination of the authorities, that it can not inquire into the internal condition of Cuba during the revolt to determine whether a state of belligerency or war in the international sense existed there or not; that this is a political question for the executive branches of each Government to determine, and that the views expressed by them must be followed by the Commission.

In the case of the *Three Friends* (166 U. S.), decided March 1, 1897, and passing upon the status in Cuba during the last insurrection, Chief Justice Fuller, in delivering the opinion of the court, says (p. 63):

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt—between recognition of the existence of war in a material sense and of war in a legal sense—is sharply illustrated in the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time, and since the forfeiture is alleged to have been incurred.

After quoting from the President's proclamation of June 12, 1895, and his annual messages of December 2, 1895, and December 7, 1896, the court continues as follows (p. 65):

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents by the political department has not taken place; and it can not be doubted that, this being so, the action in question is applicable.

In the *Ambrose Light* (25 Fed. Rep., 408) Judge Addison Brown says:

(3) Recognition of belligerency or the accordance of belligerent rights to communities in revolt belongs solely to the political and executive departments of each government.

(4) Courts can not inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments and recognize only what those departments recognize, and in the absence of any recognition by them must regard the former legal condition as unchanged.

In *Gelston v. Hoyt* (3 Wheat., 246, 324) Judge Story says:

No doctrine is better established than that it belongs exclusively to governments to recognize new States in the revolutions that may occur in the world, and until such recognition, either by our own Government or by the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held in *Rose v. Himely* (4 Cranch., 241), and to that decision on this point we adhere.

To the same effect is the language of Chief Justice Marshall in *U. S. v. Palmer* (3 Wheaton, 610, 635), and similar is the rule of the English law. *City of Berne v. Bank of England* (9 Ves., jr., 347); *The Manila, Edw. Adm. I.* (p. 418).

In *Williams v. Suffolk Insurance Company* (13 Peters, 415) Mr. Justice McLean, in delivering the opinion of the court, says (p. 420):

And can there be any doubt that when the executive branch of the Government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country it is

conclusive on the judicial department? And in this view it is not material to inquire, nor is it in the province of the court to determine, whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and Government of the Union.

If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments a foreign island or country might be considered as at peace with the United States, while the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise and so destructive of national character.

In *Rose v. Himely* (4 Cranch, 271) Chief Justice Marshall says:

The colony of St. Domingo, originally belonging to France, had broken the bond which connected her with the parent state, had declared herself *independent*, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and St. Domingo. It has been argued that the colony, having declared itself a sovereign State, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to *courts*. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.

In *Kennett v. Chambers* (14 How., 38) Chief Justice Taney says (p. 50):

It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent State was a question for that department of our Government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent State the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign State before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department.

It appearing clear from an examination of the above cases, and many others that might be cited, that the Commission can not examine into the internal condition of Cuba for the purpose of determining whether or not belligerency or a state of international war as distinguished from a revolt or insurrection existed there, and that we are bound by the determination of the executive departments of either or both Governments in the premises, and that in the absence of any recognition by them, or either of them, we must regard the former legal conditions as unchanged, it next devolves upon us to ascertain

and determine what position the executive departments of the Governments took upon the question of belligerency.

Although the insurrection assumed great magnitude, and a bloody and cruel warfare raged upon the island for more than three years, yet we believe that belligerent rights were never granted to the insurgents by either Government so as to create a state of war in the international sense which exempted the parent Government from liability to foreigners for the acts of the insurgents.

Articles VI and VII of the treaty of 1898, which provides for the settlement of these claims, and which was prepared by skilled diplomats who did not use words loosely and without reference to their meaning and effect in international law, seem to us to declare that the late conflict between Spain and the Cubans was an insurrection and not a war.

It will be noticed that in both of these articles the conflict between Spain and the Cubans is spoken of as an "*insurrection*," and the Cubans as "*insurgents*," and where the conflict between Spain and the United States is referred to it is described as a "*war*."

ARTICLE VI.

Spain will, upon the signature of the present treaty, release all prisoners of war and all persons detained or imprisoned for political offenses in connection with the *insurrections* in Cuba and the Philippines and the *war* with the United States.

Reciprocally the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the *insurgents* in Cuba and the Philippines.

ARTICLE VII.

The United States and Spain mutually relinquish all claims for indemnity, national or individual, of every kind, of either Government, or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late *insurrection* in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the *war*.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

From an examination of the diplomatic correspondence between the two Governments and the messages of our President it becomes evident to us that the late conflict in Cuba was regarded only as an insurrection, and not as a state of war.

Note of Mr. Dupuy de Lome to Mr. Olney, June 4, 1896:

The Government of His Majesty appreciates to its full value the noble frankness with which that of the United States has informed it of the very definite opinion it has formed in regard to the legal impossibility of granting the recognition of belligerency to the Cuban insurgents.

Note of Señor Gullon to Mr. Woodford, October 3, 1897:

In this connection it is timely to remember that the American Government had to admit, in its note of April 4, 1896, that it was impossible to recognize the belligerency

of the rebels at that time, although the insurrection was in a much more flourishing condition, and that if Spain were withdrawn from the island of Cuba the sole bond of union between the many heterogeneous elements in the island would disappear, which proves the necessity of her presence and the absurdity of the idea that there can be any other organization in the island possessing the attributes of lawful international personality. The insurgents, as has already been said on another occasion by His Majesty's Government, have always been, and still are, without any real civil government, fixed territory, courts of their own, a regular army, coasts, ports, navy—everything that the principal American writers on international law and statesmen require as preliminary to the discussion of a recognition of belligerency.

Secretary Sherman, in his note to Minister Woodford of November 20, 1897, says:

It is to be borne in mind that Spain insists that a *state of war* does not exist between that Government and the people of Cuba; that it is engaged in suppressing *domestic insurrection* that does not give it the right, which it so strenuously denies itself, to insist that a third nation shall award to either party to the struggle the rights of a belligerent or exact from either party the obligations attaching to a condition of belligerency. * * * Inasmuch as Spain does not concede, and never has conceded, that a state of war exists in Cuba, the rights and duties of the United States are such as devolve upon a *friendly nation* toward another in the case of an insurrection which does not arise to the dignity of *recognized war*.

Mr. Woodford to Señor Gullon, December 20, 1897:

Inasmuch as Spain does not concede, and never has conceded, that a state of war exists in Cuba, the rights and duties of the United States are such, and only such, as devolve upon one friendly nation toward another in the case of an insurrection which does not arise to the dignity of recognized war.

Señor Gullon, in his note to Minister Woodford of February 1, 1898, says:

Nor could His Majesty's Government refer to the duties of neutrality, as it maintains with the same vigor as ever its well-founded assertion that there is no reason, nor even a semblance of reason, to justify a recognition of belligerency in the Cuban insurrection.

President McKinley, in his message of December 5, 1898, says:

Setting aside as logically unfounded or practically inadmissible the recognition of the Cuban insurgents as belligerents, the recognition of the independence of Cuba, neutral intervention to end the war by imposing a rational compromise between the contestants, intervention in favor of one or the other party, and forcible annexation of the island, I concluded it was honestly due to our friendly relations with Spain that she should be given a reasonable chance to realize her expectations of reform to which she had become irrevocably committed.

The foregoing citations are merely a few selected from many, but nowhere in the diplomatic correspondence or in the public records of the Executive Department can be found any proof that there was a state of war in any international or legal sense in the island of Cuba. It was maintained throughout that it was a domestic disturbance or an insurrection which did not rise to the dignity of recognized war.

It is, however, contended by counsel for the Government that the acts of the Spanish authorities and their treatment of the Cuban insur-

gents constitute a recognition of the belligerency of the insurgents by Spain, and so raise the struggle to the dignity of a war *de jure*. In support of this contention they cite us to the following acts of the Spanish authorities, viz:

(1) The proclamation of Governor-General Calleja, dated February 27, 1895, declaring the provinces of Santiago de Cuba and Matanzas in a state of war.

(2) The decree of General Campos, dated January 2, 1896, which states that a general requisition of all horses useful for the services of war will be made in the provinces of Santa Clara, Matanzas, Habana, and Pinar del Rio.

(3) Former cartels executed between Spanish and Cuban generals in the field.

(4) Note of the Duke of Tetuan to Mr. Taylor, September 29, 1896. We will treat these acts in their order.

(1) The proclamation of Governor-General Calleja: This proclamation states on its face that it was made under the authority of the law of April 23, 1870. This law is entitled "Spanish law of public order," and expressly states that it has no application to cases of foreign nor of civil war formally declared. The provisions of the law seem to be wholly inconsistent with the idea that those against whom its provisions are employed could be belligerents, in that the law provides for the punishment of insurgents as criminals, whereas, though a prisoner of war may for military reasons be detained in confinement, he is never punished criminally for the act of bearing arms. The proclamation being made under the authority of this law could not possibly be a recognition of the belligerency of the insurgents. The intention of the law was, apparently, to give to minor Spanish officials the right to declare a portion of the territory of Spain under martial law in times of disorder.

(2) The decree of General Campos: This decree was issued on January 2, 1896. On the same day the Spanish authorities declared the provinces of Habana and Pinar del Rio in a state of war, pursuant to the provisions of the law of April 23, 1870, being the "Spanish law of public order." It seems plain that in speaking of the "necessities of war" in the decree calling for requisitions of horses, General Campos means the kind of war with which the Spanish law of public order deals, and this, as we have shown, is a state of riot or insurrection, which, though it may be war in the material sense, is not war in the legal sense. The argument of the Government seems to be that requisitions are used in war; that the decree of General Campos provides for a general requisition of horses, and that therefore the insurrection was a war. As well might it be argued that skirmishes, battles, shooting, and killing take place in war, that all of these took place in Cuba, and that therefore the insurrection was war. It should

also be remembered that the requisition was not a war right exercised upon enemies, but a domestic right exercised upon subjects. There is nowhere a suggestion in the decree that the loyalty or disloyalty of the owners of the horses had anything to do with the question. In times of domestic disorder governments are often required to take property for military use, and military commanders have frequently exercised such power. The exercise of this power, however, *per se*, does not establish war in the legal sense, nor does it involve nations in any of the consequences thereof.

(3) Formal cartels executed between Spanish and Cuban generals in the field: We have been unable to find that any formal cartels were executed between the Spanish and Cuban generals in the field. The instances to which counsel for the Government have cited us in support of their contention do not, in our opinion, rise to the dignity of cartels, and can not be construed so as to attribute to Spain a recognition of belligerency.

(4) Note of the Duke of Tetuan to Mr. Taylor, September 29, 1896: From a careful study of this note it is obvious to us that the Duke of Tetuan in claiming Spain's exemption from liability for the acts of the insurgents, and "for those claims based upon the supposed damages of the Spanish troops while pursuing necessary operations within a zone of active operations of war," relied upon the doctrine of an insurrection which had gone beyond the control of the parent government, and referred to the necessary operations of war to subdue such an insurrection. This note is therefore not a recognition by Spain of a war in the international sense. Certain it is that neither Spain nor the United States ever so treated it.

Fourteen months later Secretary Sherman writes Mr. Woodford:

It must be borne in mind that Spain insists that a state of war does not exist between that Government and the people of Cuba.

In February, 1898, Señor Gullon, the then Spanish minister of state, wrote to Mr. Woodford:

There was no reason, nor even a semblance of a reason, to justify a recognition of belligerency in the Cuban insurrection.

President McKinley said in his message of April 11, 1898:

In my annual message of December last I said, "Of the untried measures there remained only recognition of the insurgents as belligerents," etc.

It is evident, therefore, that the Spanish and United States Governments did not understand that Spain had recognized the belligerency of the Cuban insurgents either prior to or by the note of the Duke of Tetuan to Minister Taylor. Where there is expression there can be no implication to the contrary. Here we have the express declarations of the two Governments, and there can therefore be no tacit recognition of belligerency.

ARMED INSURRECTION BEYOND CONTROL.

In support of the demurrers filed by the Government it is urged as a second proposition of international law that if a state of war did not exist in Cuba in an international sense Spain was never liable for the acts of the insurgents, because a state is not liable, either to its subjects or aliens, for damages inflicted within its titular territory by insurgent forces after the insurrection has passed beyond its control.

Having held that there was no war in the international sense, we will next examine into the soundness of the Government's second contention, that a nation is not liable, either to its subjects or aliens, for damages inflicted within its titular territory by insurgent forces after the insurrection has passed beyond its control.

The rule exempting nations from liability for property destroyed by the public enemy during a state of war seems to be based upon the ground that if such damages were allowed they would be so great that the public finances would soon be exhausted. The same reason would apply where a country is struggling with an internal insurrectionary force beyond its control, and, in our opinion, the same exemption is now generally recognized by modern publicists and has become a well established doctrine of international law.

This rule has been well stated by Hall, in his treatise on International Law (pp. 231, 232, 4th ed.), as follows:

When a government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority or through acts done by the part of the population which has broken loose from control.

Bluntschli, in the new German edition of his work, published in 1872, formulates the rule in question as follows:

Sec. 380a. The States are not bound to pay indemnity for losses or damages suffered by foreigners or native subjects in consequence of international revolt or civil war.

Calvo, in treating this question (secs. 1280-1281, ed. 1896), after asking the question: "Are nations responsible or not for damages and losses suffered by foreigners in time of intestine troubles or civil war?" makes the following answer:

This question has been discussed at length and finally decided in the negative.

The foundation of the rule in its present form seems to rest to a large extent upon the acts and declarations occasioned by the claims of British subjects arising out of the "political disturbances" in Tuscany and in the Kingdom of Naples in 1849, when Messina in Sicily was bombarded by the King of the Two Sicilies, whose seat of government was at Naples, and Leghorn, in Tuscany, captured by the Austrian forces.

The assertion of the Austrian cabinet that a state is not liable for damages suffered by aliens under such circumstances was embodied in the famous note of Prince Schwartzenberg of April 14, 1850, and confirmed in that of Count Nesselrode of May 2, 1850. Calvo, in describing this incident (secs. 1283, 1284, 1285), says:

The government of Tuscany, desiring to arrange this difference amicably, conceived the idea of submitting it to the arbitration of a third power, and to that effect wrote to the cabinet of St. Petersburg. As soon as it had knowledge of the affair, the Russian Government, in a communication of May 2, 1850, addressed to its ambassador in England, declared that in its opinion the legal reason on which was based the contention between England, Tuscany, and Naples militated so evidently in favor of the last two powers that there was no room for arbitration; that in such a state of things the simple fact of accepting the rôle of arbitrator would be equivalent to admitting the existence of doubts which in that case did not exist, or to recognize a certain foundation for the claims pending, whereas there was none whatever.

The note of Mr. Uhl, Acting Secretary of State, to Mr. Springer, dated July 1, 1895 (For. Rel. U. S., 1895, vol. 2, p. 1216), is in perfect harmony with the rule as stated by Hall. The note is in part as follows:

It is a generally accepted principle of international law that a sovereign government is not ordinarily responsible to alien residents for injuries that they may receive within its territories from insurgents whose conduct it can not control. Within the limits of usual effective control law-abiding residents have a right to be protected in the ordinary affairs of life and intercourse, subject, of course, to military necessities, should their property be situated within the zone of active operations. The Spanish authorities are reported to be using strenuous endeavors to prevent the class of spoliations which the writers apprehend, and notification of any particular danger from the insurgents would probably be followed by the adoption of special safeguards by the authorities. In the event, however, of injury a claim would necessarily have to be founded upon averment and reasonable proof that the responsible officers of the Spanish Government, being in a position to prevent such injury, have failed to use due diligence to do so.

The same rule is clearly stated in the note of Mr. Adee, Acting Secretary of State, to the Mapos Sugar Company, under date of August 30, 1895. He says:

In reply you are informed that, according to the generally accepted principles of international law, a sovereign government is not ordinarily responsible to alien residents for injuries they may receive within its territories from insurgents whose conduct it can not control. Within the limits of usual effective control, law-abiding residents have a legal right to be protected in the ordinary affairs of life and intercourse, subject, of course, to military necessities, should their property be situated within the zone of active operations. The Spanish authorities are reported to be using strenuous endeavors to prevent spoliations such as you apprehend, and their notification of any particularly apprehended danger from the insurgents would probably be followed by their adoption of special safeguards. In the event, however, of injury, a claim would necessarily have to be founded upon averment and reasonable proof that the responsible officers of the Spanish Government, being in a position to prevent such injury, have failed to use due diligence to do so. (H. Doc. No. 224, p. 60, 54th Cong., 1st sess.)

In his note to Dupuy de Lome, dated Washington, July 6, 1897 (see For. Rel., 1897, p. 516), Secretary Sherman evidently had the same rule in mind. We quote the following:

This Government can not admit that the responsibility of Spain for the protection of American property within the sphere of Spanish control is to be measured by any other test than that of actual ability so to protect it.

The conclusion of the Commission is that where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents. If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities, by the exercise of due diligence, might have prevented the damages done, Spain will be held liable in that case.

It follows, as a matter of course, from the above conclusion, that the burden of proof is upon the claimant to show that the responsible officers of Spain, being in a position to prevent such injury, have failed to use due diligence to do so.

At first sight this may seem in conflict with the general rule, which is well stated by Hall (p. 226), that—

prima facie a State is, of course, responsible for all acts or omissions taking place within its territory by which another State, or the subjects of the latter are injuriously affected;

but upon closer investigation it will appear that this *prima facie* responsibility only applies when a State is in actual control of its citizens. As Rutherford has well expressed it—

A nation which did not prevent its subjects from injuring foreigners would incur responsibility, because the citizens being under its authority it is obliged to watch over them and see that they do no injury to anyone. But a similar negligence does not make a nation responsible for the acts of those of its subjects who are in a state of insurrection and have severed their bonds of allegiance, or who are not in the limits of its territory. In such case, and whatever may be in law the character which is desired to be attributed to their acts and to their conduct, these citizens cease in fact to be under the jurisdiction of their government.

The same obvious distinction is recognized by Hall, who says (pp. 231, 232) that—

When strangers enter a state they must be prepared for the risks of intestine war, because the occurrence is one over which from the nature of the case the government can have no control; and they can not demand compensation for injuries received, both because, *unless it can be shown that a state is not reasonably well ordered*, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part, which would affect it with responsibility toward a foreign state.

To put the matter in a more concrete form, the *prima facie* presumption of responsibility for injuries done to foreigners which a state is called upon to rebut ends with its normal control of the titular territory within which the damage is done. So soon as that normal control ends, so soon as the regularly constituted authorities are no longer able to control, the burden of proof is so shifted by the changed conditions that the foreigner who claims injury must aver and prove that the responsible officers of the parent state, being in a position to prevent such injury, have failed to use due diligence to do so.

Counsel for claimants, however, insist that if the doctrine of an insurrection beyond control is to be recognized at all, it can only apply to instances where the belligerency of the insurgents has been recognized, or where a state of war in the international sense actually exists.

We have been unable to discover any good foundation in reason for this contention, nor have we been able to find any authority to the effect that the exemption from liability is at all dependent upon such recognition of belligerency or existence of a state of war in an international sense. The reasons for this exemption apply with equal force to both war in a material sense and to war in a legal sense. If damages were allowed in either case, they would be so great that the public finances would soon be exhausted.

The case of John H. Hanna, before the American and British Claims Commission of 1871, seems to us to clearly hold that the doctrine of an insurrection beyond control does not depend upon "a state of war" or recognized belligerency. It is true that in this case the United States set up the recognition of the belligerency of the Confederate States by Great Britain as one of the defenses; but the Commission, in deciding the case, did not pass upon this question. The Commission unanimously sustained the demurrer in the following words:

The claim is made for the loss sustained by the destruction of cotton belonging to the claimant by men who are described by the claimant as rebels in arms against the Government of the United States.

The Commissioners are of the opinion that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control, and which acts they had no power to prevent.

Upon this ground, and without giving any opinion upon the other points raised in the case, which will be considered hereafter in other cases, the claim of John Holmes Hanna is therefore disallowed.

(3 Moore's Int. Arb., 2982-2986.)

The only remaining question which it seems necessary for us to discuss in connection with this branch of the subject, is the question whether Spain was a "reasonably well-ordered State," and as such exercised that degree of diligence which the law of nations requires to suppress an insurrection. For, after stating the rule, hereinbefore

cited, relating to an insurrection beyond control, Hall in his work on International Law, page 232, adds the following:

When strangers enter a State they must be prepared for the risks of intestine war, because the occurrence is one over which, from the nature of the case, the government can have no control; and they can not demand compensation for losses or injuries received, both because, unless it can be shown that a State is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the State itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility toward a foreign State.

The same learned author, in discussing what constitutes a well-ordered state, uses the following language, on page 230:

If its laws are such that it is incapable of preventing armed bodies of men from collecting within it, and issuing from it to invade a neighboring state, it must alter them. If its judiciary is so corrupt or prejudiced that serious and patent injustice is done frequently to foreigners, it ought to reform the courts, and in isolated cases it is responsible for the injustice done and must compensate the sufferers. On the other hand, it is impossible to maintain that a government must be provided with the most efficient means that can be devised for performing its international duties. * * * It has never been pretended, however, that a state is bound to alter the form of polity under which it chooses to live in order to give the highest possible protection to the interests of foreign states. To do so would be to call upon it to sacrifice the greater to the less and to disregard one of the primary rights of independence—the right, that is to say, of a community to regulate its life in its own way. All that can be asked is that the best provision for the fulfillment of international duties shall be made which is consistent with the character of the national institutions, it being of course understood that those institutions are such that the state can be described as well ordered to an average extent.

It certainly can not be said that in the light of this definition Spain was not a reasonably well-ordered State. She had a government, constitution, and laws of a modern monarchical type; she had a large and well organized army; a navy, courts of justice, and a complete system for the raising of the necessary revenues to support the Government; in fact, she had all the necessary and available machinery for a well-ordered government.

Nor can it be successfully contended that on the whole she did not exercise that degree of diligence which the law of nations requires to suppress an insurrection. It is a matter of common knowledge that in her endeavors to suppress the insurrection she actually armed, equipped, and sent to Cuba an army of about 200,000 men, commanded by her most distinguished generals, and actually expended several hundred millions of dollars in carrying out this enterprise; thus taxing to the utmost her military, naval, and financial resources.

The Commission, therefore, can not resist the conclusion that Spain was a "reasonably well-ordered State," within the meaning of that term in international law, and also, on the whole, exercised that degree of diligence in suppressing the insurrection which the law of nations requires.

JUDICIAL NOTICE.

OPINION OF COMMISSIONER WOOD.

Commissioner Wood. The Commission having decided that war in the material sense existed in Cuba during the late insurrection, and having also held as a principle of international law that when an insurrection has gone beyond the control of the parent government such government is responsible for only those damages done by the insurgents to foreigners which it might have prevented by the exercise of due diligence, it follows that the character and magnitude of the Cuban insurrection become important factors in fixing the status of the claimants and the defendant in the prosecution of cases before this tribunal. This question was raised in the argument on that paragraph of the ground of demurrer, which avers:

That the acts complained of were committed, and the property for which the indemnity is asked was destroyed, by insurgents in revolt against the Spanish Government, and that no liability attached to Spain, and there is no liability on the part of the United States for such acts so committed by reason of any treaty stipulations between the United States and Spain.

Counsel for claimants insist that the terms of this branch of the demurrer recite a substantive defense, that can be pleaded only in the form of an answer, and that the issue, when thus joined, must be determined upon proofs submitted on the final hearing of the cases, and that in no event can the doctrine of judicial notice be applied in passing upon the demurrer; while counsel for the United States contend that the issue is properly raised on demurrer, because the Commission must now take judicial notice of the war conditions during the insurrection in Cuba, and thus determine whether the petition states facts which, if uncontroverted, entitle claimants to an award.

In passing upon this issue, it devolves upon the Commission to decide (1) whether it will take judicial notice of the status of the insurrection, and (2) if so, whether such judicial notice can be applied in passing upon the demurrer, or whether its application can be made only at the final hearing of a case.

Judicial notice is the name of a doctrine whereby courts are permitted, in the determination of causes submitted to them, to consider certain facts and regard them as established without the requirements of allegation and proof. (Am. and Eng. Encl. of Law, vol. 17, p. 894.)

The matters of which judicial notice will be taken include facts, "judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters arising in the ordinary course of nature or the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition." (Bouvier's Law Dictionary.)

Applying these principles, to what extent can the Commission augment its knowledge of the inception, progress, and general nature of the Cuban insurrection by facts derived from judicial notice?

It is conceded that official cognizance may be taken that an insurrection existed in Cuba from February, 1895, until December, 1898. To hold otherwise would be to divest the Commission of the knowledge of the provisions and application of Article VII of the treaty essential to its jurisdiction. But can this tribunal go further, and by the application of the doctrine of judicial knowledge determine the military conditions that existed in Cuba, and from those conditions say whether Spain was able to control the insurgents? The Commission is constrained to answer this question in the affirmative, believing that the governing facts of the insurrection are historical and well established.

The struggle for the independence of Cuba began in February, 1895, and at once became formidable in the provinces of Matanzas and Santiago. The standard of revolt was raised simultaneously at Ibarra and at Baires and Jiguani, and the revolt was so serious that within three days thereafter Captain-General Calleja published at Havana a proclamation declaring the provinces of Santiago and Matanzas, comprising more than one-third of the entire area of the island, to be in a "state of war," by reason of which these districts were placed under martial law.

Aggressive steps were at once taken by Spain to crush the rebellion, and a great army was thrown against the insurgents. It is generally admitted that Spain in her effort to subdue the insurrection concentrated in the island 200,000 men. Despite this, however, the insurrection spread, and grew in volume as it proceeded westward. At the end of the first year the whole interior portion of the island had been overrun and was held by the rebels, the Spanish forces controlling only the city strongholds. As time went on the rebellion gathered strength. Spain, with the vast resources at her command, was unable to suppress the insurrection or to control the conduct of the insurgents. From its inception to its close the revolution was formidable; that it was not an unimportant uprising is demonstrated by the result of the struggle for the independence of the island, finally secured at so great a sacrifice of life and property. It was war. It would be a perversion of fact to otherwise characterize an armed conflict which in three years resulted in the sacrifice of lives of thousands of men, women, and children, and the devastation of the productive portion

the island. No war of modern times brought with it such direful and distressing results. The "abhorrent conditions" became so appalling that the United States, "in the name of humanity, in the name of civilization, in behalf of endangered American interests," felt impelled to and did intervene to put an end to the war and the sovereignty of Spain over Cuba.

Mr. Halstead, in his history of the Cuban revolution, says:

The year 1896 will be forever memorable in the history of Cuba. In the first month of it the fact that there was a greater war in the island than ever before—a war with torch and knife, and a fierce resolution on both sides to fight it out to the bitter end—became known to the world; but there were many particulars wanting to enable the public opinion of nations to be certainly grounded as to the merit of either the political and economic differences or the military situation, every point of fact being ferociously disputed. There was, however, enough obvious to inform all spectators that the insurgents had adopted a more destructive method of warfare than had appeared in the ten years' contest, and that the armed forces of the rebellion were more numerous and their policy more adventurous than on former occasions. The demonstration of this was the march of Gomez with fire and sword from the eastern through the western provinces, which had in all former experiences been exempt from invasion. It was when the burning cane fields reddened the sky in the provinces of Matanzas, Havana, and Pinar del Rio, and the ruddy glare was discerned from the streets of Havana and the decks of steamers on the Gulf, that the great military chieftain and pacificator of Spain, Martinez Campos, who had hastened to the scene of former exploits to close up the insurrection at once, was recalled; and this seemed, to thoughtful men, to declare beyond dispute the loss to Spain of the island.

The successor, after a short interval, of Campos (Weyler) has occupied about the same time with substantially the same results. Spain has made terrible sacrifices and the insurrection continues. * * *

It was in the month of February (1896) that the Weyler administration began, and now it is December—ten months passed—and we hear again that the Captain-General is about to suppress the insurrection in Pinar del Rio and Habana and Matanzas provinces, in the order in which they are named, and then there is to be sugar grinding, Spanish reform, and a rule of beneficence; but the reports, so far as they are intelligible and within the limitations of reasonable authenticity, do not prepare us for the immediate appearance of the repeatedly promised results. The two great features of the Cuban war have been the raid of Gomez, taking the island lengthwise last year, and the fight of Maceo this year in the western province. The Spanish nation has made great sacrifices, sparing neither men nor money. Indeed, the power and persistence displayed by Spain have been remarkable, and show a greater vitality than we were prepared to observe. The army now in Cuba, with the volunteers, still 50,000 strong—the whole 200,000 men—would be formidable in the fields of Europe, but seems, as a rule, helpless in the deep-mud roads and terrible jungles and the swamp and mountain ambuscades of Cuba, especially in the rainy season, which is two-thirds of the time. (The Story of Cuba, pp. 581-583.)

This will not be a ten years' war. It is too fast and furious to last so long. The tedious struggle from 1868 to 1878 was, in its most important manifestations, confined to two provinces, and those of the extreme east, and of the least importance to agriculture and commerce of the six modern divisions of the island. * * *

This war is another affair. The military forces engaged are three times as large on both sides as they were when they reached their maximum, before Campos succeeded in arranging the truce of Zanjón. The policy of Gomez has been this time to force conclusions, and the way he reduces Spanish resources is obvious. First, the

armies of the Spaniards are, with the volunteers and the guerrilla bands, nearly 200,000, and they can not live off the country, as it has been swept with fire, despoiled of labor, and deprived of domestic animals. The food supplies must come from abroad and are found especially in Spain and the United States; and expenses, it is thus accountable, are greatly in excess of all former periods. * * *

The policy of Gomez has been to make the war a matter of urgency. He is, as Lord Randolph Churchill said of Mr. Gladstone, "an old man in a hurry," and he wants the fight fought before the famine comes. He responded to Spain's imposing military forces aggressively, and there were two purposes in the character he gave his campaigning. The first was to abolish the Cuban revenues of Spain by stopping the grinding of cane, and at first he only fired enough cane fields to give notice that sugar production was inconsistent with the Cuban struggle for liberty. Second, the discontinuance of the ordinary occupations of labor on the sugar plantations set free for war purposes multitudes of strong men, and they ground their machetes, conscripted horses and mules, and set forth soldiers of fortune and freedom. It was with these men the celebrated raid of November last was made, and that, with the aid of the ultra Spaniards, who demanded inhumanity, overthrew Campos and substituted Weyler. (Story of Cuba, pp. 412-414, Halstead.) * * *

De Lome said further that "without military success nothing could be accomplished;" and there has been no considerable military success on either side. The insurgents must win if the aggressions of Spain are all failures. The season rapidly passes when military operations on a large scale are practicable, and the fourth year of the war promises a continuation of inconsequent effort, but it is reported that reinforcements of several thousand Spaniards are on the way over the sea. Both sides are feeling that a crisis is at hand, and claiming to do more fighting than usual, but all the reports are unreliable, and the war drags on tediously, and if it were possible for Spain to conquer Cuba, it would be at the expense of her ruin. (Story of Cuba, p. 635.)

While this history was written under circumstances that rendered accuracy of details difficult, it is regarded by the Commission as a reliable exposition of the general conditions that obtained in Cuba during the insurrection, and it is only general conditions that need be regarded in passing upon the issue under consideration. Nor can the Commission ignore the account of the military operations given by Señor Quesada in his history of that war, though written by a partisan advocate of the insurgent cause. Agreeing as it does with what are established facts, his history of Cuba is entitled to high consideration.

In his contribution to the historical work, Cuba's Struggle Against Spain, Colonel Roosevelt says:

Early in June Gomez invaded the province of Puerto Principe and in a few days there was a general uprising throughout the province. The Marquis of Santa Lucia, an ex-Cuban president, joined the insurgents, whose ranks were daily increasing, and active hostilities were carried on, a regular campaign on each side being commenced. The orders of Gomez to his followers were to attack all small Spanish posts and secure arms, to destroy railroad and telegraph lines, Spanish forts, or buildings where resistance was made, to destroy all crops or mills whose owners refused to contribute to the Cuban war fund, and to keep on the defensive unless they could fight at great advantage.

Campos's orders were to protect sugar estates and railroads, to attack unless the enemies forces were three to one, to release all rebels who surrendered unless they held rank as officers, and to keep the towns supplied with provisions.

The rainy season did not put an end to the conflict, although the Spanish troops suffered severely from the tropical climate. The first serious check given to the royal troops was at the battle of Bayamo, July 12, where General Santocildes was killed. The fighting was long and bloody; the insurgent forces were skillfully managed by Maceo, and they claimed to have killed and disabled 300 Spaniards. The immediate presence and good generalship of Campos alone saved the army from a disastrous rout. In August, the revolt had spread to the Santa Clara Province, a rich, level district, where many Americans owned property, and Gomez was preparing to invade the western provinces. Late in this month, the expedition of Rolof and Rodriguez, from Key West, Fla., landed on the shores of Santa Clara Province; and before long the insurgents were traversing the provinces of Matanzas, Habana, and Pinar del Rio, a portion of the island heretofore regarded as sacred from the torch of insurrection. The revolutionary government elected the Marquis of Santa Lucia president, and Bartolome Masso, vice-president; Maximo Gomez was confirmed as general in chief of the liberating army; and Antonio Maceo, general in chief of the invading army, with the rank of lieutenant-general. After the defeat of General Suarez Valdez by Gomez, General Pando was sent over from Spain with 30,000 men.

The favorite method of repressing the Cubans seems to have been the construction of the trocha, a kind of fortified wall which the Spaniards seemed to regard as impregnable, but to their surprise it was broken through, and by the end of the rainy season the rebel army was swarming over the western provinces. November 17, Maceo, with a force of 1,900 men, defeated General Navarro near the city of Santa Clara, and Gomez won another victory in the same neighborhood November 19 and 20. General Campos made a stand at Coliseo, in Matanzas Province, and met with severe check. Gomez attacked him with 7,000 men, and being reenforced by 1,500 insurgents, he made a bold charge, at the same time firing a cane-field in which the Spaniards attempted to make a flank movement, and thus driving them back to Havana Province. This victory enabled the insurgents to carry the war to the very gates of Havana, for the burning fields fired by them could be seen from the city, and before the end of the year 1895, Maceo had a large force massed in the province of Pinar del Rio, west of Havana.

The extent and consequences of the insurrection became so alarming that Campos was recalled January 17, 1896, and General Weyler, a man with a reputation for great sternness and severity, was sent to take his place.

Senator Henry Cabot Lodge, in his history, *The War with Spain*, says (at pages 12-14):

There is no need to trace here the history of this last insurrection. The insurgents formed a government, carried on a vigorous guerrilla warfare, swept over the island from Santiago to the outskirts of Habana and into Pinar del Rio, and soon held sway over most of the provinces outside the towns. They fought better, and were better led, by partisan chiefs like Maceo and Garcia, than ever before. But the head and front of the rebellion was Maximo Gomez, a man of marked ability and singular tenacity of purpose. His plan was to refuse all compromises, to distribute his followers in detached bands, to fight no pitched battles, but incessant skirmishes, to ravage the country, destroy the possibility of revenue, and win in the end either through the financial exhaustion of Spain or by the intervention of the United States, one of which results he believed must come if he could only hold on long enough. His wisdom, persistence, and courage have all been justified, for the results have come as he expected, and the rest of the story is to be found in the course of events in the United States.

When the insurrection of 1895 broke out it excited at first but a languid interest among the people of the United States, who are only too well accustomed to revolutions in Spanish-American countries. It soon was apparent, however, that this was

not an ordinary South American revolution; that the Cubans were fighting the old fight of America to be free from Europe; that they were in desperate earnest, would accept no compromises, and would hold on to the bitter end. Then, too, a few months sufficed to show that this time the Cubans were well led, that their forces were united, that they were not torn with factional strife, and that they were pursuing an intelligent and well-considered plan. Interest in the United States began to awaken, and grew rapidly as the success of the Cuban arms became manifest. In the ten years' war the insurrection never spread beyond the hill country of the extreme east. Now, in six months, the province of Santiago, except for the seaports, had fallen into Cuban control, and the Cuban forces marched westward, taking possession of all the rural districts as far as Habana.

* * * * *

Pages 15 and 16:

The war did not die out, as the opponents of Cuba confidently predicted that it would, in the course of a month. On the contrary, it continued; the insurgents were successful in their plan of campaign; they kept gaining ground and getting a more and more complete control of the interior of the island. On July 13, 1895, the battle of Bayamo was fought—the only considerable action of the war, for Gomez avoided steadily all stricken fields. At Bayamo, however, he won a decisive victory, and Martinez Campos, who barely escaped, was forced to resign, and was recalled six months later. * * * The insurgents continued their operations without serious check; they broke through the trochas, swarmed into Pinar del Rio, wandered at will about the country, and carried their raids even into the suburbs of Habana.

* * * * *

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It was apparent to all but the most prejudiced that even if the insurgents could not drive the Spaniards from Cuba, the island was lost to Spain. With 200,000 soldiers in 1897 Spain had utterly and miserably failed to put down the rebels, who never had in arms, in all parts of the island, over 35,000 men.

But it is not to these histories alone that the Commission looks for the record of the controlling facts of the insurrection in Cuba. The authorities agree that "it is not essential in order that courts may exercise the function of judicial notice that the facts in question should have been formally recorded in any written history or book of science" (Am. and Eng. Encl. of Law, vol. 17, p. 895, and cited cases); and that "where the subject is a proper one for judicial notice, the judges may, in order to accurately inform themselves, resort to such credible and trustworthy sources of information as are available" (Am. and Eng. Encl. of Law, Vol. 17, p. 901, and cases cited). For reasons so well known that they need not be repeated here, the hostilities in Cuba were a source of anxious concern to the United States and every detail of the struggle was noted by this Government, whose interest in its results was second only to that of Spain. The action of the Congress, the diplomatic correspondence, state papers, and executive documents of this Government are a rich contribution to the history of the Cuban rebellion, and to these, as well as to all other reliable sources, it is the province and duty of the Commission to turn for information.

A concurrent resolution was passed by the Senate (February 28, 1896, by a vote of 67 yeas and 6 nays) and by the House of Representatives (April 6, 1896, by a vote of 247 yeas and 27 nays), as follows:

Resolved, That, in the opinion of Congress, a condition of public war exists between the Government of Spain and the government proclaimed and for some time maintained by force of arms by the people of Cuba; and that the United States of America should maintain a strict neutrality between the contending powers, according to each all the rights of belligerents in the ports and territory of the United States.

Resolved further, That the friendly offices of the United States should be offered by the President to the Spanish Government for the recognition of the independence of Cuba. (Congressional Record of Apr. 6, 1896, vol. 28, p. 3627.)

Secretary Olney wrote to Minister de Lome April 4, 1896, as follows:

The last preceding insurrection lasted for ten years, and then was not subdued, but only succumbed to the influence of certain promised reforms. Where is found the promise that the present rebellion will have a shorter lease of life, unless the end is sooner reached through the exhaustion of Spain herself? Taught by experience, Spain wisely undertook to make its struggle with the present insurrection short, sharp, and decisive; to stamp it out in its very beginnings by concentrating upon it large and well-organized armies—armies infinitely superior in numbers, in discipline, and in equipment to any the insurgents could oppose to them.

Those armies were put under the command of its ablest general, as well as its most renowned statesman—of one whose very name was an assurance to the insurgents both of the skillful generalship with which they would be fought and of the reasonable and liberal temper in which just demands for redress of grievances would be received. Yet the efforts of Campos seem to have utterly failed, and his successor, a man who, rightfully or wrongfully, seems to have intensified all the acerbities of the struggle, is now being reenforced with additional troops. It may well be feared, therefore, that if the present is to be of shorter duration than the last insurrection, it will be because the end is to come sooner or later through the inability of Spain to prolong the conflict, and through her abandonment of the island to the heterogeneous combination of elements and of races now in arms against her. (For. Rel. U. S., 1897, pp. 542, 543.)

July 16, 1897, Secretary Sherman, in his instructions to Minister Woodford, said:

Beginning in February, 1895, in an uprising which, like the previous insurrection of Yara, was local and unorganized, the movement rapidly spread until, on the 27th of that month, the superior authority of the island deemed it necessary to issue a proclamation declaring the rich and populous districts about Matanzas, and Santiago de Cuba in a "state of siege." Thereafter, notwithstanding the extensive military operations undertaken to crush the revolt, and despite the unprecedented exertions put forth by Spain and the armies and treasure poured into the disturbed territory, the conflict extended over the greater part of the island and invaded the western provinces, which the insurrection of Yara had failed to arouse.

For more than two years a wholly unexampled struggle has raged in Cuba between the discontented native population and the mother power. Not only has its attendant ruin spread over a larger area than in any previous contest, but its effects have been more widely felt and the cost of life and treasure to Spain has been far greater. The strife continues on a footing of mutual destruction and devastation. * * *

The question arises, then, whether Spain has not already had a reasonable time to restore peace and been unable to do so, even by the concentration of her resources

and measures and unparalleled severity, which have received very general condemnation. The methods which Spain has adopted to wage the fight give no prospect of immediate peace or of a stable return to the conditions of prosperity which are essential to Cuba in its intercourse with its neighbors. Spain's inability entails upon the United States a degree of injury and suffering which can no longer be ignored * * *. (For. Rel. U. S., 1898, pp. 558-560.)

On June 12, 1895, President Cleveland issued this proclamation to the people of the United States:

Whereas the island of Cuba is now the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established Government of Spain, a power with which the United States are and desire to remain on terms of peace and amity; and

Whereas the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adverse to such established Government, by accepting or exercising commissions for warlike service against it, by enlisting or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such Government:

Now, therefore, in recognition of the laws aforesaid, and in discharge of the obligations of the United States toward a friendly power, and as a measure of precaution, and to the end that citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties, I, Grover Cleveland, President of the United States of America, do hereby admonish all such citizens and other persons to abstain from every violation of the laws hereinbefore referred to, and do hereby warn them that all violations of such laws will be rigorously prosecuted; and I do hereby enjoin upon all officers of the United States charged with the execution of said laws the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same. (Messages of the Presidents, vol. 9, p. 591.)

President Cleveland, in his annual message of December 2, 1895, referred to the Cuban insurrection as follows:

An insurrection in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws, and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty. * * * Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfill every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed, and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits. (Messages of the Presidents, vol. 9, p. 636.)

In his fourth annual message, dated December 7, 1896, President Cleveland says:

The insurrection in Cuba still continues with all its perplexities. It is difficult to perceive that any progress has thus far been made toward the pacification of the island or that the situation of affairs as depicted in my last annual message has in the least improved. If Spain still holds Havana and the seaports and all the considerable towns, the insurgents still roam at will over at least two-thirds of the island country. If the determination of Spain to put down the insurrection seems but to strengthen with the lapse of time, as is evinced by her unhesitating devotion of largely increased military and naval forces to the task, there is much reason to believe that the insurgents have gained in point of numbers and character and resources and are none the less inflexible in their resolve not to succumb without practically securing the great objects for which they took up arms. * * *

But the reasonableness of a requirement by Spain of unconditional surrender on the part of the insurgent Cubans before their autonomy is conceded is not altogether apparent. It ignores important features of the situation—the stability two years' duration has given to the insurrection; the feasibility of its indefinite prolongation in the nature of things, and, as shown by past experience, the utter and imminent ruin of the island unless the present strife is speedily composed. * * * (Messages of the Presidents, vol. 9, p. 716.)

President McKinley, in his message to Congress of December 6, 1897, says:

The present insurrection in Cuba broke out in February, 1895. It is not my purpose at this time to recall its remarkable increase or to characterize its tenacious resistance against the enormous forces massed against it by Spain. The revolt and the efforts to subdue it carried destruction to every quarter of the island, developing wide proportions and defying the efforts of Spain for its suppression. (Messages of the Presidents, vol. 10, p. 128.)

The following is from President McKinley's message of April 11, 1898:

Since the present revolution began in February, 1895, this country has seen the fertile domain at our threshold ravaged by fire and sword in the course of a struggle unequalled in the history of the island and rarely paralleled as to the numbers of the combatants and the bitterness of the contest by any revolution of modern times where a dependent people striving to be free have been opposed by the power of the sovereign State.

Our people have beheld a once prosperous community reduced to comparative want, its lucrative commerce virtually paralyzed, its exceptional productiveness diminished, its fields laid waste, its mills in ruin, and its people perishing by tens of thousands from hunger and destitution. * * *

The war in Cuba is of such a nature that short of subjugation or extermination a final victory for either side seems impracticable. The alternative lies in the physical exhaustion of the one or the other party, or perhaps of both—a condition which in effect ended the ten years' war by the truce of Zanjón. (Messages of the Presidents, vol. 10, p. 143.)

When it is considered that these messages of the Chief Executive, fraught with matters of gravest concern to this nation and its citizens, were not only communicated to the representatives of the people in the Congress, but were published to the world by the press of the country,

it is idle to argue that the public were not educated in the knowledge of the conditions that obtained in Cuba during the insurrection and the attitude and critical relations of the United States thereto.

Again, in applying the doctrine of judicial knowledge to historical facts, the highest courts have repeatedly decided that "Courts take judicial notice of the events constituting the history of the country, as well as of transactions and objects intimately connected therewith." (Am. and Eng. Encl. of Law, p. 907, and cases cited in notes.) Also "of the existence of a war in which their country is involved, and of the facts of public history connected with its origin, progress, and conclusion." (*Ibid.*)

For many years the history of Cuba has been interwoven with that of our own country. So involved have been the political and business interests of this Government and its citizens in the affairs of that island that no history of this country will be complete that does not include the record of events in Cuba and their relation to the United States during the last half of a century.

As early as 1854 the Ostend manifesto declared—

The intercourse which its [Cuba's] proximity to our coast begets and encourages between them and the citizens of the United States has, in the progress of time, so united their interests and blended their fortunes that they now look upon each other as if they were one people and had but one destiny.

The late revolution especially appealed to the sentiment and sympathy of all classes, who watched with unabated interest the determined struggle of the island for independence, and the desperate resistance of Spain, spurred on by the threatened loss of her colonies in the West Indies and the humiliation such loss would bring to that ancient and proud monarchy. But it was more than sentiment that moved the United States to active interest and finally to intervention. It was the disastrous effect of the hostilities upon the commerce of this country, the expense and embarrassments incident to the maintenance of neutrality, the contagion to which this country was exposed growing out of the unsanitary condition of Cuba, the devastation of the vast property interests of American citizens in the island, and the suffering and deprivation entailed upon all classes of noncombatants by the methods of warfare adopted by both the insurgent and Spanish armies, and, above all, the demonstrated inability of Spain after three years of determined but futile effort to subdue the insurrection or keep it within reasonable control. These were the conditions that caused the United States to declare war against Spain. These conditions were notorious and well understood by the people of this country. The absurdity involved in holding that a nation may go to war without the public, to whom it must look for both moral and physical support, being familiar with the reasons therefor is too apparent to require elucidation.

The doctrine of judicial knowledge being founded upon the sound principle that it is unnecessary and inexpedient to require proof of that which is or should be generally known, if the facts under consideration are matters of common knowledge, it is immaterial from what source such knowledge is derived. The Commission can not resist the conclusion that the controlling facts of the war in Cuba are impressed upon the public mind through the multifarious channels of information open to all who keep in touch with the progress of events, and that the dramatic agencies which created a new nation, a new republic, in the Western Hemisphere are known to the world. Paraphrasing the language of Mr. Halstead: Cuba was a splendid stage on which was performed the last act of the drama of Spain in America. It was Spain's war with her children. All nations were spectators—our own with the greater share of interest and sympathy.

As there is an undoubted qualification of this rule which provides that a court's right to take judicial notice is circumscribed by the limits of its jurisdiction, every tribunal exercising the right should be careful to guard against its infraction. The jurisdiction of certain courts is defined by geographical boundaries, while that of others, unfettered by such a limitation, follows the subject-matter over which its right of adjudication extends. A typical illustration of the latter class are courts of admiralty, whose jurisdiction, necessarily reaching beyond the geographical boundaries of the nation to which they belong, is as wide as the area of the high seas. It was therefore held by a court of admiralty of the United States in the cases of the *Peterhof* (*Blatch. Prize Cases*, 463) that it would take judicial notice of the location of a foreign city with reference to a bar in a river which vessels of a specific draft could not cross. As this Commission has been charged with the duty of administering international law in reference to a subject-matter lying beyond the geographical boundaries of the United States, it can not doubt that, like other courts charged with the administration of the same law, the limits of its jurisdiction must be determined not by geographical boundaries, but by the *situs* of the subject-matter to which its power of adjudication extends.

This Commission will therefore take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed from the first beyond the control of Spain, and so continued until such intervention and war took place.

But it is argued by counsel for claimants that if a petition contains facts the proof of which would apparently entitle the plaintiff to recover, upon demurrer thereto a court can not read into the petition additional facts of which it has judicial knowledge, and thereby render the pleading insufficient in law; that the application of such knowledge can be made only to annul a false allegation of the petition. This

contention of counsel, reduced to its logical conclusion, is that notwithstanding the Commission knows now that no recovery can be had on a petition, nor upon proof of its allegations, yet it is powerless to act until an answer is filed and the issue of facts submitted on the proofs, the procuring of which, from the nature of the cases, will involve great labor and expense to both claimants and defendant. Not until then can the Commission, by the application of facts judiciously known from the beginning, decide that no recovery can be had on the petition, because it does not state facts sufficient to constitute a cause of action. In the opinion of the Commission this position can not be sustained.

This issue arose in the case, cited by counsel for the Government, of *The People v. The Oakland Water Front Co.* (118 Cal., 234). The Supreme Court, in its decision, says:

That this complaint, considered by itself, states a cause of action is a proposition that does not admit of doubt, and the ruling of the superior court sustaining the general demurrer was not rested upon the ground that its allegations were in themselves insufficient to entitle the plaintiff to any relief. * * *

It is contended on the part of the appellant that the superior court erred in holding that it could look beyond the face of the complaint in ruling upon the demurrer; that the doctrine of judicial notice is only a rule of evidence, and can not be applied to the construction of a pleading; that a demurrer admits the truth of every fact that is well pleaded, and that a fact may be well pleaded, notwithstanding the existence of a valid law establishing conclusively the direct reverse of the matter alleged.

We do not think these propositions are sustainable either upon reason or authority. The allegation of a sound conclusion of law is always regarded as superfluous in pleading, and the allegation of an unsound conclusion is entirely disregarded. This is undeniably true with respect to laws establishing general rules of right or obligation, and there is no reason why it should not be held equally true in respect to a law which merely determines the status of a particular thing. Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result? These questions answer themselves and make it entirely clear that there are no considerations of expediency or convenience to support the contention of appellant. It is also opposed to the authority of more than one decision of this court.

The sensible reasoning of the court in the above case applies with equal force to the cases under consideration.

But assuming that counsel are right in their contention that upon demurrer courts are limited in the application of judicial knowledge to facts which negative an allegation of the petition, this does not, in the judgment of the Commission, conflict with the application of the doctrine in passing upon the demurrer under consideration. The principles of law that apply to the presentation and adjudication of a claim for indemnity against a foreign nation for injuries inflicted by

insurgents in armed rebellion against such nation vary with the character of the insurrection. If the insurrection out of which the claim arose did not pass from the control of the parent state, in the petition or memorial setting forth a claim for insurgent damages, it would perhaps be sufficient to aver only the fact that the injury was inflicted by the insurgent forces. But where it is sought to recover for injuries received at the hands of insurgents during an insurrection that was beyond control of the sovereign state, the petition must contain the additional averments that at the time the injuries were inflicted such state was in a position to have prevented the injuries but negligently failed to do so.

In the petitions to which demurrers have been sustained the claimants allege in substance, if not in terms, that the injuries for which they seek indemnity were received at the hands of the Cuban insurgents, and stop there. There are no sufficient allegations as to the ability of Spain to have prevented the injuries, or of negligence on part of that Government. Therefore, in construing these petitions, the logical and legal inference is that claimants base their right to recovery on the assumption that the insurrection in Cuba did not pass from the control of Spain. By necessary implication the facts so assumed are averred in the petitions. Thus construed, the petitions state facts in direct conflict with those officially known to the Commission to be true. It follows that, in sustaining the demurrer, the Commission applies the principle, invoked by counsel for claimants, that courts may upon demurrer take judicial notice of facts that negative the allegations of the pleading to which the demurrer is directed.

Having already decided that this tribunal will take judicial notice that the Cuban insurrection passed from the first beyond the control of Spain, the Commission further decides that such knowledge will be applied in passing upon the pending demurrers. To otherwise decide the issues raised by the demurrer under consideration would, in the opinion of the Commission, be an abrogation of a power the exercise of which in these cases is clearly within the rule governing the application of the doctrine of judicial notice. It would also be an inexcusable disregard of duty, imposing as it would upon litigants unnecessary burdens and conditions practically impossible to meet.

The Commission does not decide that during the entire period of time covered by the insurrection the Spanish Government was without control in every portion of the island where American citizens suffered loss or injury at the hands of the insurgents, nor that at all times and under all circumstances Spain made proper use of her resources to control, nor that in all cases, or in any case, she exercised that degree of diligence in protecting the property and persons of foreigners imposed by treaty and the law of nations. It is here decided

only that the Government of Spain was powerless to check the continuing growth in numbers, strength, and aggression of the insurgents and to seriously impede the progress of the revolution that resulted in the independence of the island; that from the beginning the insurrection as a whole passed beyond the control of Spain, and that at no time thereafter did that Government reestablish its authority and control in the island.

Under these conditions, and applying the principles elsewhere enunciated by the Commission, Spain having thus lost her control over the insurrection did not, as a matter of international law, become responsible for damages to the persons or property of foreigners done by insurgents, except in cases where by the exercise of proper diligence on the part of the Spanish authorities such damages could have been prevented.

USE OF WAR MEASURES TO SUBDUE AN ARMED INSURRECTION AND ITS LIMITATIONS.

OPINION OF COMMISSIONER DIEKEMA.

Commissioner DIEKEMA: From the citations and conclusions of the Commission already set forth, it has become evident that neither the proportions which an insurrection may assume, nor the extent or character of the military operations actually engaged in, determine whether or not it is a war in the international or legal sense, or a mere political revolt or war in the material sense. But in either case it is war with all of its attendant horrors. In either case the opposing parties are enemies acknowledging no common superior and submitting their differences to the arbitrament of the sword.

Self-preservation is the first law of nations as well as of individuals, and it therefore becomes a self-evident proposition that a parent government may resort to arms to subdue an armed insurrection.

It is clear that the only means such a government possesses, to restore order and maintain the rule of law, consist in raising the military forces necessary to quell the insurrection, and in leading them to fight against the rebels who have become enemies and who have given to the territory occupied by them the character of enemy country, for enemies are all those against whom the nation has been compelled to employ the public force, and to put itself for its own conservation on a footing of war. This right has been exercised by nations during all times. Spain waged actual war against the Netherlands for more than seventy years, although she never acknowledged it as war.

England during the contest with her American colonies always exercised the rights of war, although the word war was not used. The fact that national pride prevented the use of the word did not alter the character of the conflict. So the struggle between Spain and Cuba was war in fact, with armies on both sides arrayed against each other, fighting bloody battles, taking towns, and performing all of those acts that constitute actual war.

In the case of *Rose v. Himely* (4 Cranch, p. 240) Chief Justice Marshall expressly asserts that a sovereign who is endeavoring to reduce his revolted subjects to obedience possesses both sovereign and *belligerent* rights and is capable of acting in either character. This case involved a consideration of the relations between France and the colony of Santo Domingo, then in revolt, and whose belligerency had not been recognized, and is therefore clearly in point.

Senator Charles Sumner, in his elaborate oration, delivered in the Senate of the United States, May 19, 1862 (See Congressional Globe, part 3, second session, Thirty-seventh Congress, page 2188), after quoting the above citation from Chief Justice Marshall, proceeds to so clearly and forcefully elucidate this proposition, and to fortify his conclusions with such ample authorities that we feel constrained to use the following quotation therefrom:

On a similar state of facts, arising out of the efforts of France to suppress the insurrection in St. Domingo, the supreme court of Pennsylvania asserted the same principles; and here we find the eminent Chief Justice Tilghman—one of the highest authorities of the American bench—giving to it the weight of his enlightened judgment. These are his words: "We are not at liberty to consider the island in any other light than as a part of the dominions of the French Republic. *But supposing it to be so, the republic is possessed of belligerent rights.* * * *

"Although the French Government, from motives of policy, might not choose to make mention of war, yet it does not follow that it might not avail itself of all rights to which, by the laws of nations, it was entitled in the existing circumstances." * * * "This was the course pursued by Great Britain in the Revolutionary war with the United States." * * * Considering the words of the decree, and the circumstances under which it was made, it ought not to be understood simply as a municipal regulation, but a municipal regulation connected with a *state at war* with revolted subjects. *Cheviot v. Fousset* (3 Binney Rep., 252, 253).

The principle embodied in these authorities has been accurately stated by a recent text writer as follows:

"A sovereign nation, engaged in the duty of suppressing an insurrection of its citizens, may, with entire consistency, act in the twofold capacity of sovereign and belligerent, according to the several measures resorted to for the accomplishment of its purpose. By inflicting through its agent, the judiciary, the penalty which the law affixes to the capital crimes of treason and piracy, it acts in its capacity as a sovereign, and its courts are but enforcing its municipal regulations. By instituting a blockade of the ports of its rebellious subjects, the nation is exercising the rights of a belligerent, and its courts, in their adjudications upon captures, are organized as courts of prize under the laws of nations." (Upton's Maritime Warfare and Prize, 212.)

But the same principle has received a most authentic declaration in the recent judgment of an able magistrate in a case of prize for a violation of the blockade. I refer to the case of the *Amy Warwick*, tried in Boston, where Judge Sprague, of the district court, expressed himself as follows:

"The United States have full belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance, and have added the guilt of treason to that of unjust war."

Among all the judges who have been called to consider judicially the character of this rebellion, I know of none whose opinion is entitled to more consideration. Long experience has increased his original aptitude for such questions, and made him an authority.

But there is an earlier voice, which, even if all judicial tribunals had been silent, would be decisive. I refer to Grotius, who, by his work *de Jure Belli ac Pacis*, became at once the lawgiver of nations. Original in conception, humane in sentiment, vast in plan, and various in learning, this work created the science of international law, which, since that early day, has been softened and refined without essential change in the principles then enunciated. This master mind anticipated the true distinction, when, in his definition of war, he wrote as follows:

"The first and most necessary partition of war is this: that war is *private, public, and mixed*. Public war is that which is carried on under the authority of him who

has jurisdiction. Private, that which is not so. *Mixed, that which is public on one side and private on the other.*" (Lib. I, cap. 3, sec. 1.)

In these few words of this great authority will be found that very discrimination which enters into the present discussion. The war in which we are now engaged is not precisely "public," because on one side there is no government; nor is it "private," because on one side there is a government, but it is "mixed;" that is, public on one side and private on the other. On the side of the United States it is under the authority of the Government, and is therefore "public;" on the other side it is without the sanction of any recognized government, and is therefore "private." In other words, the Government of the United States may claim for itself all belligerent rights, while it may refuse them to the other side. And Grotius, in his reasoning, sustains his definition by showing that war becomes the essential agency where public justice ends; that it is the justifiable mode of dealing with those who can not be kept in order by judicial proceedings, and that, as a natural consequence, where war prevails the municipal law is silent. And here, with that largess of quotation which is one of his peculiarities, he adduces the weighty words of Demosthenes: "Against these whom the laws can not reach we must proceed as we oppose our public enemies, by levying armies, equipping and setting afloat navies, and raising contributions for the prosecution of hostilities." (Grotius, Prolegom., sec. 23.) There is so much intrinsic reason in this distinction that I am ashamed to take time upon it. And yet it has been constantly neglected in this debate. Let it be accepted, and the constitutional scruples which have played such a part will be out of place.

In all the annals of history there can probably be found no more bitter or cruel conflicts than civil wars. In early times the rules governing international warfare were not considered applicable to civil warfare, and unrestrained cruelty, unbridled license, and acts of wanton brutality characterized the struggle.

In later years, however, insurrectionary or civil warfare has been subjected to the rules and usages of international warfare, and inhumanity and wanton cruelty have not been allowed. Sir James Mackintosh well says in his *Discourse on the Law of Nations*, 38:

In the present century a slow and silent but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time it is raised from the rank of mere usage and becomes part of the law of nations.

Upon this topic of the use of war measures to subdue an armed insurrection, and its limitations, we cite further the following authorities:

A civil war produces in the nation two independent parties who consider each other as enemies, and acknowledge no common judge; constituting, at least for a time, two separate bodies, two distinct societies. On earth they have no common superior. They stand therefore in precisely the same predicament as two nations who engage in a contest, and being unable to come to an agreement, have recourse to arms. (Vattel's *Droit des Gens*. III, ch. 18, sec. 293-294.)

Hannis Taylor, in his work on *International Public Law*, pages 453-454, quotes the above with approval, and adds:

Origin and object do not affect war rights or duties. The right of search, the treatment of prisoners, and all else is the same in a just as in an unjust war, one of independence or religion. The nature of the conflict may arouse patriotism at home and even intervention from abroad. That is a political matter for each state to

solve. But increase of number of combatants, from these or any other causes, does not change the laws governing the conduct of the war itself. It is all war, whatever its cause or object, and should be conducted in a civilized way.

General Halleck says:

A war of revolution is generally undertaken for the dismemberment of the state by the separation of one of its parts or for the overthrow and radical change of the government, while an insurrectionary war is sometimes waged for a very different purpose. Both, however, have respect to the internal affairs of the state rather than to its external relations. They are therefore in one sense civil wars and are governed by the same general rules which are applied to that class of wars. (Halleck's International Law, vol. 1, p. 503.)

Even when persons under military occupation revolt against their conqueror, the law does not justify unnecessary cruelty. The insurgents taken in arms, as well as their instigators, may therefore be put to death, as well as their property confiscated or destroyed; but the extreme right of the conqueror over military insurgents is limited by the law of humanity, and he is not justified if he resort to cruel and unnecessary punishments. (Halleck's International Law, vol. 2, p. 454.)

Hall says:

When a government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their persons or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority or through acts done by the part of the populace which has broken loose from control. (Hall's International Law, 231-232.)

As civilization has advanced during the last centuries, so has likewise steadily advanced the principle that all wars, whether international or civil, must be waged according to the code of civilized warfare as recognized by the modern practice of nations; and while, as a general rule, citizens of a foreign country who reside within the arena of a civil war which has gone beyond the control of the parent government can not recover for the losses or injuries which they may sustain, yet the rule has its limitations and must not be so construed as to give immunity to every outrage which may be perpetrated by those in the service of such a government simply because they occurred during the time and upon the theater in which hostilities were prosecuted.

The Commission, whose duty it is to ascertain and administer international law, when questions of right depending upon it are presented for its consideration, being desirous to adopt the present views of nations as sanctioned by their recent practice, therefore holds that as war between Spain and the insurgents existed in a material sense, although not a state of war in the international sense, Spain was entitled to adopt such war measures for the recovery of her authority as are sanctioned by the rules and usages of international warfare. If, however, it be alleged and proved in any particular case that the acts of the Spanish authorities or soldiers were contrary to such rules and usages, Spain will be held liable in that case.

The Commission can not presume that in any particular case Spain, having the right to use belligerent measures, violated the rules and usages of international warfare in their exercise any more than it could presume in cases of damages caused by the insurgents after the insurrection had gone beyond the control of Spain that she was guilty of negligence. It is therefore incumbent upon the claimant who has suffered damages as a result of such violation to allege and prove the same.

TREATY OF 1795 AND PROTOCOL OF 1877.

In the year 1795 the United States entered into a general treaty with the King of Spain. This treaty provided for the settlement of all differences and vexatious questions then existing between the two countries, and also made far-reaching provisions relating to the future conduct of the two nations toward each other during times of peace and war, and has formed the basis of our relations with Spain from that day to this.

The protocol of 1877 was declarative of certain provisions of this treaty relating to matters of judicial procedure, and was designed to give to the citizens or subjects of one of the contracting powers when within the territorial borders of the other due process of law and a trial exclusively by the ordinary jurisdiction, except in the case of being captured with arms in hand.

No division of opinion exists among the Commissioners as to whether this treaty and protocol were in full force and effect during the insurrection in Cuba. We all agree that they were, and that they should be applied in cases properly falling within their provisions.

A sharp contest, however, has arisen between counsel for the Government and counsel for claimants relating to the correct construction and scope of certain articles of this treaty and as to their bearing upon the cases arising before the Commission.

Articles VI and VII are the principal subjects of contention. Article VI reads as follows:

Each party shall endeavor by all means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover, and cause to be restored to the right owners, their vessels and effects which may have been taken from them within the extent of their said jurisdiction, whether they are at war or not with the power whose subjects have taken possession of the said effects.

The first two clauses of Article VII read as follows:

And it is agreed that the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatever; and in all cases of seizure, detention, or arrests for debts contracted or offenses committed by any citizen or subject of the one party within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only and according to the regular course of proceedings usual in such cases.

Counsel for the Government contend:

(1) That Article VI, and the first clause of Article VII, apply only to the neutral rights of persons on the high seas, and that they do not apply to rights on land; that the terms "vessels and cargoes" and "vessels and effects" are used as synonymous terms; that the embargoes or detentions, against which the first clause of Article VII stipulates, relate solely to vessels and their cargoes, to the embargo commonly known as *angaria*, which term has been defined by Phillimore as:

An act of the State, by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the State; are seized upon and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties, against their will, to carrying on direct hostilities against a power with whom they are at peace.

(2) That the construction of treaties is purely a judicial function, and that even if the executive department of the Government has held that the "embargo and detention" referred to in the first clause of Article VII applies to property on land as well as to vessels and their cargoes, such holding can have no weight with this Commission, because no decision nor action of any Department can bind another, unless such decision or action emanates from the former *while acting within the sphere of its constitutional authority*, and the Constitution of the United States does not confer upon the Department of State the right to construe treaties.

(3) That the Commission of 1871 never recognized the State Department's construction of the first clause of Article VII.

To support these contentions our attention is called to the history of the times previous to and during which the treaty was made; to the contemporaneous written statements of Pinckney, who negotiated the treaty, as to its meaning; to a comparison with contemporaneous treaties; and to the controversy between Spain and the United States concerning the meaning of its terms.

Counsel for claimants, on the other hand, contend:

(1) That the narrow interpretation of the word "effects" to the appurtenances of a ship, and of the word "embargo" as applying only to shipping, is altogether inadequate to carry out the amicable intent and generous purpose of the treaty, which was the protection *by sea or by land* not only of ships, but of any "*other*" effects of the citizens or subjects of the respective countries; that Phillimore, in defining *angaria*, limits its meaning to *military operations alone*, whereas Article VII is a prohibition against the appropriation of the property, "vessels or effects," for "any military expedition *or other public or private purpose whatsoever*."

(2) That the construction of treaties is not the peculiar province of the judicial department; that it is not the province of the courts of law to expound treaties with respect to the rights and obligations

of sovereign states parties thereto, but only as far as they concern the rights of individuals; that the rights asserted and the injuries complained of in the cases now before the Commission are manifestly not capable of enforcement as between private parties in the courts of the country, but are such only as the political department alone can present in the name of the sovereign and as a matter of public right demand reparation for; and that therefore the construction of the provisions of the treaty bearing upon these cases as made by the political department of the Government is binding upon this Commission; that the State Department has for more than thirty years held that the words "effects" and "embargo" apply to property on land as well as to vessels and their effects, and that this construction has been acquiesced in by Spain, and was recognized by the Commission of 1871.

(3) That while generally under the provisions of the principles of international law a nation is not obliged to do more for foreigners than for its own subjects or citizens, yet under the provisions of Article VII of the treaty of 1795 foreigners have greater rights to protection than either of the contracting parties' own subjects or citizens; that they and their property must be protected at all hazards; that the treaty is an absolute guaranty to them, and that in the full performance of this treaty obligation the contracting parties are bound, if necessary, "to sink their last ship, to spend their last dollar in the public treasury, to call the last man into service—in short, to go into bankruptcy."

In support of these contentions our attention is called to the exact language of the treaty provisions; to the construction which has heretofore been given by the political department of the Government, the courts, and previous commissions to the articles of the treaty now in dispute; to the correspondence between the executive departments of the two Governments relating to these questions, and to the general rules of law relating to the construction of treaties.

CONSTRUCTION OF TREATIES.

This Commission does not believe that the construction of those provisions of treaties which relate to the obligations of sovereign states, parties thereto, is the peculiar province of the judicial department, but that this is rather the peculiar province of the political departments, and that the judicial department should follow the construction which the political departments have agreed upon.

The general rule upon this subject we believe to be well stated in the American and English Encyclopedia of Law (1st ed., vol. 26, p. 555), as follows:

It is not the province of courts of law to expound treaties with respect to the rights and obligations of sovereign states, parties thereto, but so far as they concern the rights of individuals it is frequently necessary for the courts to ascertain by construction the meaning intended to be conveyed by the terms used. And when this

duty arises the courts adopt those general rules applied in the construction of statutes, contracts, and written instruments generally, in order to effect the purpose and intention of the makers.

The cases cited by counsel for the Government to substantiate their position, that the construction of treaties is the peculiar province of the judicial department, seem upon careful reading to clearly recognize the distinction set forth in the above-quoted rule, and to restrict the judicial function in the construction of treaties to controversies between individuals.

The first case cited by counsel is the case of *Ogden v. Blackledge* (2 Cranch, 272). This case relates solely to the rights of individuals and to the construction of a treaty upon the plea of the statute of limitations in an action of debt between individuals.

The next case cited is that of *Wilson v. Wall* (6 Wall., 83, 89). This case involves the construction of the treaty of the United States with the Choctaw Indians. It only involves the rights of individuals to land claimed under the provisions of this treaty, and Judge Grier, in delivering the opinion of the court, said:

Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary when a case shall arise between individuals.

The next case cited is that of *Strother v. Lucas* (12 Pet., 439). This is an ejectment case, and involves a contest between individuals concerning certain Missouri land titles. In deciding this contest the court necessarily passed upon certain treaty provisions that had no relation whatever to the obligations of the sovereign states, parties thereto, but only to the rights of individuals thereunder.

The citation to Butler's Treaty Making Power of the United States, volume 2, page 363, does not assist counsel. The following language is there used by Mr. Butler:

It has also been held that although the judicial department has no treaty-making or legislative power it is the peculiar province of that department to construe treaties and statutes.

In a footnote the author cites as authorities for this doctrine the cases hereinbefore referred to, all of which relate solely to questions and rights of individuals under certain treaty provisions. The author in the above quotation simply states what "has been held," and therefore does not intend to lay down a doctrine more comprehensive than expressed in the holdings to which he refers.

Neither does the citation to Kent's Commentaries, fourteenth edition, page 350, controvert the general rule as found in the American and English Encyclopædia of Law, but on the contrary it rather confirms it. The quotation from Kent is as follows:

But Congress has no power, it is said, to settle rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary

when a case shall arise between individuals. On the other hand, the courts of the United States can not question the power of the other party to a treaty to do certain acts when he has been treated as having the power by the President and Senate.

We believe it to be absolutely necessary for the general welfare of the people and in the interest of good government, that the courts shall not in any manner assume the province of construing those provisions of treaties relating to the obligations of sovereign states parties thereto, and we believe this to have been the position taken by the Supreme Court from the very beginning of our country's history. Without this power the political departments would be continually hampered and at a decided disadvantage in carrying on our foreign relations.

The reasons for such noninterference by the courts are well stated by Wharton in his *International Law Digest*, Volume II, page 672, as follows:

The executive and judicial departments of the Government being coordinate powers, it follows that judicial decisions on questions of international law, while entitled to great respect, do not bind the department as would rulings of a superior tribunal.

In addition to other reasons for this position, the very fact that the judiciary applies municipal law, while the Department of State is bound to consider not merely municipal law but the relation of the United States to foreign powers irrespective of municipal legislation or adjudication, makes it necessary for the Executive to act in matters of international law, as a power independent of the judiciary.

In accordance with this view, the supremacy of the political departments of the Government has been acknowledged by the judiciary in respect to territorial boundaries and to recognition of foreign governments. The Executive is also regarded by the judiciary as the final tribunal by whom is to be determined the question of the pressure of claims by citizens of the United States on foreign sovereigns.

A construction of a treaty also by the courts of one of the contracting sovereigns can only have municipal operation; nor can such construction be set up, even by the sovereign by whose courts it is pronounced, as an authority when conducting negotiations with the other sovereign as to the meaning of the treaty. That meaning is a matter of international settlement. If the parties can not agree in reference to it, it must be referred to arbitration, or, as a last resort, to war. Nor can the judiciary control the actions of the Executive in either the construction or the application of a treaty.

Mr. Justice Miller, in delivering the opinion of the court in the *Head Money Cases* (112 U. S. R., p. 598), very clearly states what we believe to be the sound doctrine of construction as to those provisions of a treaty which relate to the rights and obligations of the contracting parties to the treaty, and the rights and obligations of individual citizens or subjects of such countries, viz:

A treaty is primarily a contract between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek

redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute.

In the case of *Taylor v. Morton* (2 Curtis Cir. Ct. R., 454), affirmed by the United States Supreme Court in 2 Black, 481, the question arose as to whether Congress, by the provisions of the tariff act, had violated the sixth and seventh articles of the treaty between the United States and Russia, wherein it is stipulated to the effect that no higher rate of duty shall be imposed on importations from Russia than on like articles from the most favored nations. The duty charged under the provisions of this tariff law on hemp was \$40 per ton, whereas plaintiffs charged that it should have been but \$25, the same as the hemp of India. The court held that a promise in a treaty addresses itself to the political and not to the judicial department of the Government, and that the court could not try the question whether the treaty had been observed or had been violated.

In re Cooper (143 U. S. R., p. 503) the court, after holding that it would be contrary to the settled law of the land to review the action of the political departments of the Government relating to the Alaskan question, uses the following language, viz:

We are not to be understood, however, as underrating the weight of the argument that in a case involving *private rights* the court may be obliged—if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the Executive to do so—to render judgment, "since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."

From the foregoing authorities, which we believe to be sound in principle and to correctly set forth the law in the premises, it becomes evident that it is the peculiar province of the political departments of governments to construe those provisions of treaties relating to the obligation of sovereign states parties thereto, and that it is likewise the peculiar province of the courts to construe those provisions of treaties which relate to private rights.

Since, then, it is admitted that the rights asserted and the injuries complained of in the cases now before this Commission are manifestly not "capable of enforcement as between private parties in the courts of the country," and are such only as the political department alone can present in the name of the sovereign and as a matter of public right demand reparation for; and since all differences arising between governments relating to the construction of treaties to which they are parties must be settled either by agreement, arbitration, or war, it becomes evident that if we find as a matter of fact that the executive departments of the United States and Spanish Governments have agreed upon the construction of the provisions of the treaty in question, such construction becomes binding upon this Commission, and it becomes entirely unnecessary and unprofitable to consider how the individual members of the Commission might have construed these disputed provisions in the absence of such agreement.

A good illustration of such an agreement is the Cushing protocol, which was in effect nothing but the record of a conference held at Madrid on the 12th of January, 1877, between the minister plenipotentiary of the United States of America and the minister of state of His Majesty the King of Spain, in which the respective parties mutually desiring to terminate amicably all controversy as to the effect of existing treaties in certain matters of judicial procedure, and for the reasons set forth and representations exchanged in various notes and previous conferences, proceeded to make declaration on both sides as to the understanding of the two Governments in the premises, and respecting the true application of said treaties.

The protocol was never confirmed by the Senate of the United States, and did not pass through any of the formalities of a treaty. It simply recorded an agreement reached between the executive departments of the two Governments relating to the proper construction of certain provisions of the treaties already existing, which construction thereafter became binding upon the judiciary.

We do not decide that a construction of the treaty given by the executive department of the United States Government and not concurred in by Spain would be binding upon this Commission, being a domestic tribunal charged with the administration of international law; but we do decide that, if the construction given by the executive department of the United States Government to the treaty provisions in question has received the concurrence of Spain, such agreement is binding upon this Commission.

We will, therefore, next proceed to consider what construction, if any, has been given by the executive department of the United States Government to the provisions of the treaty in dispute, and whether or not Spain has concurred in such construction.

CONSTRUCTION GIVEN BY THE POLITICAL DEPARTMENT OF OUR GOVERNMENT TO THE TREATY OF 1795, AND CONCURRENCE IN SUCH CONSTRUCTION BY SPAIN.

For a period of over seventy years after the making of the treaty of 1795 with Spain no case seems to have arisen which required a construction by our Government of the articles now in question. In 1870, however, the then existing insurrection gave rise to such construction. Many claims of American citizens, arising out of alleged violations of the provisions of Article VII, were presented through the State Department to Spain for payment, and were subsequently adjudicated by a mixed commission.

On the 24th day of June, 1870, Mr. Hamilton Fish, then Secretary of State, addressed a note to United States Minister Sickles at Madrid, in which he inclosed a copy of a note addressed by him to Mr. Lopez Roberts on the 9th day of June, 1870, under the supposition that Roberts still exercised the extraordinary powers as to Cuba conferred upon him by his Government during the previous year. In both of these notes Mr. Fish complains of the violation by Spain of the seventh article of the treaty of 1795. Spain's acts of spoliation are referred to as "*embargoes*," and in each case the act of embargo complained of related to real or personal property of United States citizens situated in Cuba, and not to vessels or their effects. (For. Rel. 1871, p. 697-700.)

On the 26th day of July, 1870, United States Minister Sickles, after having received from Secretary Fish his instructions, addressed a note to the Spanish minister of state in which he gives a comprehensive review of the situation, and after reciting the seventh article of the treaty of 1795, clearly asserts that its provisions apply to property on land as well as on the sea. (For. Rel., 1871, 701-705.)

On the 14th day of October of the same year, Sagasta, the Spanish minister of state, answers the foregoing communication and in behalf of Spain asserts that said seventh article of the treaty of 1795 is entirely inapplicable to the embargoes in question, both in spirit and letter; that it is composed of three clauses; that the *first* refers only to the embargo or detention of vessels, or effects for the use of any military expedition, or for public or private purposes, or the embargo commonly known as *angaria*; that the *second* clause does not treat at all of property, but only of the citizen himself when apprehended or arrested, etc.; and that the *third* treats of the means of defense which shall be guaranteed to him in the foregoing case. (For. Rel., 1871, p. 708-713.)

From this construction of Article VII, United States Minister Sickles did, on the 14th day of October, 1870, in a note addressed to Sagasta expressly dissent, and, although it seemed unnecessary for

the matters then under consideration, yet, lest it might thereafter be claimed that Sagasta's construction had been tacitly assented to by the United States, he clearly reaffirms the construction given to the article in question in his note of the 26th of July, 1870. (For. Rel., 1871, p. 720-729.)

On the 30th day of January, 1871, Christino Martos, the new Spanish minister of state, addressed a note to Minister Sickles in which he says that Spain proposes to scrupulously observe the treaty of 1795, and that this narrows down matters to perfectly defined limits and renders unnecessary a discussion of the general principles of international law. (For. Rel., 1871, p. 665-668.)

On July 11, 1873, Minister Sickles addressed a note to Secretary Fish, in which he states that the Spanish colonial minister did not hesitate to evince his disapprobation of the embargo proceedings in Cuba, and that so far as related to embargoes, decreed by mere executive authority against the property of citizens of the United States, he agreed that they were indefensible in view of the seventh article of the treaty of 1795, not to speak of the rules of international law, which prohibited such measures against the citizens or subjects of friendly countries. (For. Rel., 1873, p. 1007.)

Soon thereafter Spain by decree revoked all embargoes made by executive authority in Cuba, and cooperated with the United States in inducing Spanish agents in Cuba to return the illegally embargoed property. The appointment of a mixed commission to adjudicate these "embargo" claims, as well as others, was agreed upon, and all claims were referred to it.

We have been unable to find any case before this mixed commission where it was called upon to construe the first clause of Article VII of the treaty of 1795, and the above correspondence in which the United States all of the time asserts that the embargo relates to property on land as well as to vessels and their effects, and in which Spain at first insists that it only relates to vessels and their effects, but finally tacitly admits the American construction practically comprises all of the correspondence between the representatives of the two Governments upon this subject as a result of the ten-years war.

After the breaking out of the last Cuban insurrection the question of the proper construction of Article VII of this treaty again became important.

On the 14th day of February, 1896, Mr. Olney, then Secretary of State, addressed a note to Mr. Dupuy de Lome, the Spanish minister to the United States, in which he complains of the taking of horses, mules, and fodder by the Spanish soldiery from American citizens, contrary to the provisions of the first clause of Article VII of the treaty, and asserts that its application to the class of cases above

described has never been questioned on the part of the Spanish Government. (For. Rel., 1896, pp. 670, 671.)

To this letter Mr. Dupuy de Lome made the following reply:

LEGATION OF SPAIN, *April 1, 1896.*

MR. SECRETARY: Referring to the contents of your note of the 14th of February last, I have the honor to inform you that the governor-general of the island of Cuba, in a dispatch which I have just received, states that he has issued positive orders to the civil as well as military authorities of the island in conformity with the wishes expressed by your excellency in your above-mentioned note, General Weyler adding that all representations presented by the consuls of the United States, as I had the honor to previously state to your excellency, will be attended to at once and determined always with the strictest justice.

I will avail, etc.,

E. DUPUY DE LOME.

(For. Rel., 1896, p. 673.)

Between the dates of these two letters Mr. Olney wrote Mr. Dupuy de Lome two other letters, dated March 2 and 13, respectively, and giving instances of the violation of treaty rights by Spain in the taking of horses, mules, and food stock by her soldiery, and expressly refers the minister to his letter of February 14, in which he cites and construes the first clause of Article VII of the treaty which he claims is violated by such conduct. No word is received from Spain dissenting to this construction, but, on the contrary, word is received that instructions have been given to the civil and military authorities to comply with the wishes expressed in the letter of February 14, and in afterwards referring to this note in a letter to Secretary Sherman (For. Rel. 1897, p. 516-517), Mr. Dupuy de Lome says:

I have not forgotten the correspondence which passed between His Majesty's legation and the Hon. Richard Olney, when he was at the head of the Department now under your worthy charge, nor my note of April 1, 1896, whereby I gave assurances to which your honor refers as gratifying with respect to the expropriation for military purposes of property belonging to citizens of the United States and the enforcement of Article VII of the treaty of 1795.

It should also be borne in mind that in the note of Secretary Sherman (For. Rel. 1897, p. 515), to which the above was a reply, Mr. Sherman had used the following language:

Your Government has admitted the wrongfulness of the practice of expropriating the property of the citizens of the United States even when the military exigencies of a campaign in the field might be pleaded in excuse for taking supplies and food for which rightful compensation is made.

Spain therefore had notice that in not dissenting from the construction placed by the United States upon the first clause of Article VII of the treaty, and in stating that orders had been given to the Spanish officers in Cuba in accordance with these wishes, she must be considered as having assented thereto.

During all of the correspondence relating to the order forbidding the exportation of leaf tobacco from Cuba (For. Rel. 1896, p. 684-695) Secretary Olney repeatedly asserts that this order is a violation of the first clause of Article VII of the treaty.

Spain denies that this order is a violation of the treaty, but does not base this denial upon the ground that the first clause of Article VII is not applicable to land property. The Duke of Tetuan, in a note addressed to the minister plenipotentiary of the United States on the 24th day of April, 1897, expressly admits that it does so apply, but that the order relating to tobacco is not a violation thereof, because it does not relate to tobacco bona fide acquired or contracted for prior to the date thereof. We quote from this letter as follows:

There has not been, therefore, and could not have been, any violation of any international pact whatever. The proclamation of May 16 does not in the least oppose Article VII of the treaty of 1795, because, as stated in said proclamation and as admitted by Y. E. in the second part of the conclusions of your note of May 11, it does not refer to tobacco bona fide acquired or contracted for prior to that date. There has been, therefore, no detention or embargo of goods belonging to American citizens, *which is what said Article VII expressly prohibits*; and secondly, it is not possible to admit that the treaty of 1795 has been violated on the part of the Spanish Government.

From the foregoing we conclude that as a matter of fact the political department of the United States Government has construed the first clause of Article VII of the treaty of 1795 in question to embrace real estate and personal property on land as well as vessels and their cargoes, and that such construction has been concurred in by Spain; and therefore the Commission will adhere to such construction in making its decisions.

NO LIABILITY FOR DAMAGES DONE TO PERSONS OR PROPERTY FOUND IN THE TRACK OF WAR, OR FOR DAMAGES RESULTING FROM MILITARY MOVEMENTS, UNLESS UNNECESSARILY AND WANTONLY INFLICTED.

The general rule that the property of alien residents, like that of natives of the country, when in the track of war is subject to war's casualties, and that no liability attaches to the government whose flag the army bears and whose battles it may be fighting, is well established and universally admitted.

Hall says that a government "is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions." (Hall's International Law, p. 232.)

Acting Secretary Edwin F. Uhl, in his note to Springer, dated July 1, 1895, says:

Within the limits of usual effective control, law-abiding residents have a right to protection in the ordinary affairs of life and intercourse, subject, of course, to military necessities should their property be situated within the zone of active operations. (For. Rel., 1895, vol. 2, p. 1216.)

Acting Secretary of State Adee, in a letter written to the Mapos Sugar Company on the 30th day of August, 1895, uses the same language. (House Doc. No. 224, p. 60, Fifty-fourth Congress, first session.)

Counsel for claimants, however, insist that in the treaty of 1795 each one of the contracting parties undertook and agreed to do more for the citizens or subjects of the other than for its own, and that in order to fulfill these treaty obligations to the citizens of the United States during the recent insurrection in Cuba, Spain was called upon to exhaust all of her resources, if need be, to protect the persons and property of our citizens; they claim, in effect, that if the estate of an American should be located in the track of her advancing or retreating forces she must march them around it; that the safety of the persons and property of our citizens was absolutely guaranteed against injury, loss, or destruction, even from necessary military movements to suppress the armed revolt; in short, that everywhere and at all times Spain was obliged to conduct the military movements of her forces with specific reference to the interests of United States citizens in Cuba.

With this extreme, and to us absurd, doctrine we can not agree. It is contrary to reason and to every dictate of public policy. Can it be supposed that either Spain or the United States thus bartered away her sovereignty or imperiled her existence? It is a well-known and universally accepted principle of international law that a sovereign can not barter away his sovereignty or imperil his existence, yet this would be the logical result of the construction contended for by counsel.

Can a treaty be conceived of whose stipulations would deprive either one of the contracting parties from the free exercise of the natural right of self-preservation? This would not be consistent with reason, law, or common sense.

Vattel, in his *Law of Nations*, page 251, says:

Every interpretation that leads to an absurdity ought to be rejected.

On page 252 of the same work he further says:

Now, we are not in any case to presume that it was their intention to establish an absurdity; and therefore when their expressions, taken in their proper and ordinary meaning, would lead to absurd consequences it becomes necessary to deviate from that meaning just so far as it is sufficient to avoid absurdity.

Hall, in giving those rules of construction and interpretation, against which no objection can be urged, says that when the words of the treaty fail to yield a plain and reasonable sense, the reasonable instead of the literal sense of words should be taken when the two senses do not agree. (Hall *Int. Law*, p. 354.)

We submit that it is absurd to say that a century ago both Spain and the United States deliberately stipulated away such war rights as might be necessary to self-preservation whenever the exercise thereof,

in good faith by either, might injure the persons or property of the other.

If a government is no longer obliged by its treaty obligations to send succor to its allies when it is attacked and has need of all its forces for its own defense; and if it may without the slightest imputation of perfidy abandon an alliance when through the ill success of the war it is threatened with impending ruin if it does not immediately treat with the enemy, and there seems to be ample authority for both of these propositions, then certainly the language of the treaty in question should not be so interpreted as to deprive either of the contracting parties from the free use of legitimate war measures when its very existence is threatened with impending destruction.

The Florida Treaty Commission, appointed in 1821, which was called upon to construe many of the provisions of the treaty of 1795, did not hesitate to limit the apparent broad meaning of the language used in Article VI of the said treaty.

That Commission held that that part of said article which imposes upon the contracting parties the obligation to endeavor by all means in their power to protect and defend all vessels and their effects belonging to citizens or subjects of either, which should be within the jurisdiction of the other, by sea or by land, neither binds them to dispossess a belligerent captor of his prize, nor to exert the power of wresting from the court of such captor the authority of deciding upon the legality of the capture, although such court sat in Spanish territory where such prize was carried. (See Moore's International Arbitrations, vol. 5, pp. 4514-4515.)

By the fourteenth article of the treaty of 1831 between the United States and Mexico, each Government engages to give its "special protection" to the persons and property of the citizens of the other, transient or dwelling in its territory, etc., and it was argued in the Salvador Prats Claim (Moore, pp. 2887-2888) that each Government had thereby contracted to guarantee the safety of such persons and property.

Mr. Wadsworth disposes of this contention in the following language.

The argument for claimant treats this stipulation for special protection as a guaranty of security under all circumstances; but we do not take that view of it. The most literal interpretation of special protection can not make an insurance.

The whole article defines the character of this protection and shows that the Government merely designed to place aliens, transient or dwelling within their territory, on an equality with citizens in this respect. Herein consists this special protection. Indeed, it stipulates no more than every just government must undertake in behalf of its own citizens within its own jurisdiction. We do not think by this article either of the governments has agreed to afford any more or further protection to strangers within its borders than is justly due to its own citizens, or meant to establish any inequality between subjects and strangers either in the matter of protection or in the mode or measure of redress for injuries to persons or property. Each gov-

ernment has given special protection to all having a right to invoke it whenever it does all in its power to enforce *its* laws, repress and punish violence, and put down by force of arms armed revolt.

The Commission therefore concludes that neither the first clause of Article VII, nor any other provision of the treaty of 1795, will be so applied as to render either nation, while endeavoring to suppress an insurrection which has gone beyond its control, liable for damages done to the persons or property of the citizens of the other nation when found in the track of war, or for damages resulting from military movements, unless the same were unnecessarily and wantonly inflicted.

OPINION OF COMMISSIONER CHANDLER.

Commissioner CHANDLER. Although the principles governing adjudication which sustain the most important propositions made by this Commission in connection with its decisions upon various demurrers to petitions, have been completely explained by Commissioners Diekema and Wood, it seems to me to be my duty to refer briefly to the presentation they have made, to state the views of the Commission on points of less difficulty, and to examine additionally some of the reasons against our conclusions which have been urged by Commissioners Maury and Chambers, as well as the counsel for the claimants.

POINTS DECIDED BY THE COMMISSION—ONLY THOSE CLAIMS ARE TO BE ALLOWED WHICH WERE LAWFUL CLAIMS AGAINST SPAIN—JUDICIAL NOTICE TAKEN OF PUBLIC FACTS.

Commissioner Wood has shown that no claims can be allowed against the United States by this domestic commission which would not be allowed against Spain if they were pressed directly upon that Government before an international tribunal. He has also shown that the Commission is bound to take notice of the great public and historical facts as the result of which Cuba took her place as an independent republic in the family of nations—through an insurrection of the Cuban people, which passed from the first beyond the control of Spain, and so continued until independence was achieved.

NO ABSOLUTE BARRIER TO ALL CLAIMS BY REASON OF RECOGNIZED BELLIGERENCY AND WAR IN AN INTERNATIONAL SENSE. THESE DID NOT EXIST.

Commissioner Diekema has shown the unsoundness of the broad contention of the Attorney-General that there was a recognition of the belligerency of the Cuban insurgents which created a state of war in an international sense and which in and of itself constituted an absolute barrier against all claims of citizens of the United States against Spain for damages done by such insurgents.

A PARENT NATION NOT LIABLE FOR DAMAGES DONE BY INSURGENTS WHERE THE INSURRECTION HAS GONE BEYOND CONTROL.

Proceeding further, therefore, to consider the extent of any liability which might exist for claims of that character, Commissioner Diekema has shown that where an armed insurrection has gone beyond the control of the parent government the latter, as a general rule, is not liable

for damages done by the insurgents to the persons and property of neutral foreigners; this principle subject, however, to the important qualification that in any particular case where proof is made that the government, by the exercise of due diligence, might have prevented the damages, it will be liable therefor.

NOR FOR DAMAGES DONE BY ITS OWN TROOPS.

In like manner Commissioner Diekema has shown that to subdue an insurrection which has gone beyond control the Government may adopt all legitimate war measures—and will be liable for damages done to neutral foreigners only where the acts are proved to be contrary to the rules and usages of international warfare.

RECONCENTRATION AND DEVASTATION (WITH IMPORTANT LIMITATIONS) ARE LEGITIMATE ACTS OF WAR.

After the foregoing principles had been stated by the Commission, there was further argument specially concerning the reconcentration orders issued in Cuba by the Spanish authorities; and the additional conclusions of the Commission were announced, as propositions 6, 7, and 8, substantially as follows:

During war the removal of the inhabitants of a designated territory and their concentration in towns and military camps are legitimate war measures, although the abandoned real and personal property in such territory may go to decay and ruin or be destroyed through military devastation. (Note 1.)

LIMITATIONS UPON CONCENTRATION.

But notwithstanding reconcentration and devastation were thus recognized as legitimate methods of war the Commission could not doubt that it was required—as a judicial tribunal adjudicating the claims of neutral foreigners injured in their persons and property by the acts of the military authorities of a parent state engaged in warfare against an insurrection which had gone beyond control—to apply in favor of such neutral foreigners such reasonable limitations upon the exercise of the right of concentration and devastation as modern international law seems to impose. That the insurgents themselves have no remedy against their own government which they are resisting for illegitimate acts of war, is no reason why this tribunal should not enforce appropriate rules and restrictions in behalf of foreigners who ought not to be damaged without redress by acts of violence in war which are forbidden by the general rules of international law as established by the consensus of opinion at the present day.

The correct and reasonable limitations upon reconcentration and devastation it has not been difficult to discover. (Note 2.)

Neutral foreigners should have such reasonable protection as the particular circumstances of each case will permit. Responsible military officers must not unnecessarily or wantonly destroy their property. So far as the military exigency will permit, foreigners removed or concentrated should have food and shelter, be guarded from sickness and death, and from cruelty and hardship, and none of them can without remedy be more injuriously treated than are other foreigners or than are the subjects of the country.

These restrictions upon the military right of reconcentration and devastation are sustained by the principle that no damages to property should be inflicted where no military end is thereby served; and it seems reasonable to allow any claimant before a tribunal like this to aver and prove that such was his case and that the acts of war from which he suffered were illegitimate and contrary to the rules and usages of international warfare.

TREATY OF 1795 AGAINST EMBARGOES AND DETENTIONS.

The Commission having determined that the treaty of 1795 and the protocol of 1877 were in full force and effect during the Cuban insurrection, it was urged in behalf of the claimants that the first clause of article 7 of the treaty wherein "it is agreed that the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other for any military expedition, or other public or private purpose whatever," must be directly applied by the Commission to all cases of occupation by the Spanish authorities of real estate in Cuba belonging to citizens of the United States, and to all like takings and holdings of personal property of such citizens.

By the Attorney-General, however, it was contended that the circumstances existing when the treaty was made show that the above language referred only to vessels and to personal property which had been water-borne thereon, and by no reasonable construction could be applied to plantations, their crops, and the personal property connected therewith, which might receive injury in the course of a war on land like that carried on by Spain against her insurgent subjects in Cuba.

Resisting this contention of the Attorney-General as to the original meaning of the language, the counsel for the claimants further argued that its broad scope is demonstrated by the construction given to it by a hundred years of assertion on the part of the United States, acquiesced in by Spain, and applied on various occasions by arbitrators engaged in adjudicating claims of United States citizens against Spain.

The rejoinder of the Attorney-General was that the Spanish Government had distinctly denied that such a broad meaning could be given to the language of the treaty, that no award against Spain was

ever made expressly or necessarily on the assumption that the words "their vessels or effects" meant real estate and personal property on land, plantations and their buildings, machinery, agricultural crops, and animal products, but that the awards cited were made because the acts complained of were in violation of the other words of the treaty, namely:

"In all cases of seizure, detention, or arrest for debts contracted, or offenses committed * * * the same shall be made and prosecuted by order and authority of law only and according to the regular course of proceeding usual in such cases."

And that any revocations of orders issued, or concessions of any sort made by Spain upon pressure from the United States were based upon the clause last above cited, or upon principles of international law existing independently of the treaty, or upon a desire, without regard to legal rights, to avoid a conflict between unequal nations. (Note 3.)

In the contention of the Attorney-General the writer of the present opinion concurs against the views of all his associates, and therefore he dissents from proposition 10 of the Commission, that the clause in the treaty of 1795 prohibiting the embargo and detention of vessels or effects was operative as an express treaty stipulation forbidding the occupancy by Spanish troops of plantations of American citizens in Cuba during the insurrection in the island from 1895 to 1898.

SEVENTH ARTICLE OF TREATY STATES ONLY WHAT IS A PRINCIPLE OF
INTERNATIONAL LAW AT THE PRESENT DAY.

But the dissent thus stated is unimportant, for the reason that the agreement of 1795 to refrain from the embargo and detention of ships and their effects imposes no obligation not prescribed by the principles of modern international law for the protection of all property of neutral foreigners when a nation is engaged in suppressing by war a formidable insurrection.

All the Commissioners agree that either by reason of the stipulations of the treaty of 1795 or of correct principles of international law, Spain in suppressing the insurrection in Cuba was bound to abstain from the embargo or detention of the real and personal estate of neutral citizens of the United States. When Spain proceeded to embargo and detain or to confiscate without process of law any such property she became liable for so doing; and it is immaterial in connection with the adjudications of the Commission whether the duty of abstention arose from the treaty of 1795 or from general principles of international law.

That such is the obligation independent of treaty stipulations is apparently admitted by the Spanish minister of the colonies in his letter of July 11, 1873, to Minister Sickles, where he said that embargoes

decreed by mere executive authority were indefensible in view of the seventh article of the treaty of 1795 "not to speak of the rules of international law which prohibited such measures against the citizens or subjects of friendly countries." Further, on July 12, 1873, the minister, in his draft of a decree revoking all executive embargoes in Cuba, said: "There can not be found in international law any precept or principle authorizing this class of seizures which bear upon their face the stamp of confiscation; neither under any sound judicial theory is it admissible to proceed in such a manner." (Moore, 3762.) (Note 4.)

BUT THE PROHIBITION OF EMBARGOES AND DETENTIONS DOES NOT
CREATE A LIABILITY FOR DAMAGE DONE IN THE TRACK OF WAR AND
DURING MILITARY MOVEMENTS.

Therefore the real and material difference within this Commission concerning the scope and effect of the treaty of 1795 arises only from the dissent of two of its members from the eleventh proposition, that no obligation whether imposed upon a nation by treaty or otherwise not to embargo or detain the property of citizens of another nation will involve a liability in the suppression of an insurrection which has gone beyond control, for damages done to property found in the track of war or for injuries or destruction from military movements not unnecessarily and wantonly conducted.

Yet the distinction between the embargo and detention of property as a mere preparation for war and acts of devastation and destruction which are parts of actual military movements is clear and cogent. Spain in the treaty of 1795 might well agree not to prepare for any act of war with any enemy by embargoing or detaining the property of neutral citizens of the United States. So also the obligation to refrain from such seizures, as a principle of progressive international law, is intelligible and rational and commends itself to the good judgment of every inquirer. But it is irrational to suppose that Spain by treaty made one hundred years ago or by present principles of international law was bound, in the war movements of her troops for the purpose of defeating and punishing her insurgent citizens marching on to independence, to prevent at all hazards any injury by such troops to the property of foreigners found in the track of war and which it seemed necessary to damage or destroy in order to the success of the military movements in progress. Such a limitation of war powers, such a responsibility for damages done in war, have never been assumed by any nation or been imposed upon any nation by any principle of international law and are not likely ever to be enforced in any forum.

When the United States, in our treaties with the new South American Republics, which had accomplished their independence of Spain, proceeded to insert the clause that the vessels and effects of each

nation should not be subject to embargo or detention by the other nation "for any military purpose, nor for any public or private purpose whatever," care was taken to insert a qualifying clause—in our treaty with Colombia in 1824 (8 U. S. Stats., 308, art. 5), the following: "without allowing to those interested a sufficient indemnification," and the same clause in later treaties; with Central America in 1825 (*Ibid.*, 324, art. 7); with Chile in 1832 (*Ibid.*, 435, art. 5); with Venezuela in 1836 (*Ibid.*, 470, art. 8); with Ecuador in 1839 (*Ibid.*, 536, art. 8); and to insert in our treaty with Mexico in 1831 (*Ibid.*, 414, art. 8), the words "without a corresponding compensation;" and in our treaty with Peru-Bolivia in 1836 (*Ibid.*, 488, art. 4), the words "without being allowed therefor a sufficient indemnification."

In the face of these provisions it can not possibly be contended that the exemption from embargo and detention was intended to be applied to active military operations in the field, and either to prevent the destruction or capture of property in the track of war and in the way of military movements, or to require compensation to be made in all cases of such destruction or capture. Impedimenta consisting of volumes of restraining treaties and humanizing codes are not placed in the saddlebags of our cavalry captains either by the treaty of 1795 or The Hague convention of 1899.

It may be difficult for a court or commission to determine in some individual cases whether the damage to property resulted from forbidden embargoes and detentions or from permissible destruction and capture, but the duty seems to be imposed and this commission will endeavor to perform it.

The prevailing principle which has been followed and adopted by the Commission is well and accurately stated by Secretary Frelinghuysen in a letter as follows:

DEPARTMENT OF STATE,
Washington, April 17, 1883.

MR. DE BOUNDER DE MELSBRÖECK, *etc.*

SIR: I have the honor to acknowledge the receipt of your note of the 23d of November last, transmitting the memorial of Mr. Melchior Melebeck, a Belgian subject, who resided at Abbeville, in the parish of Vermilion, La., during the years 1861 to 1866, and who now claims from the United States the sum of \$16,210 as indemnity for losses of property caused, as he alleges, by the armies of the United States while engaged in active hostilities during those years with the rebel forces of the so-called Confederate States, together with interest from the month of June, 1863, to June, 1882, amounting to \$18,468, and bringing the total sum claimed up to \$34,678. * * *

The facts stated by Mr. Melebeck show very clearly that he was a permanent resident of Louisiana during the years named, and he says explicitly that "the above-mentioned objects, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, * * * were appropriated and taken by the military organizations and troops of the United States between the 13th of April, 1861, and the 20th of August, 1866." During much of this period active military operations against the enemies of the United States were being prosecuted by the Federal forces in the State of Louisiana, and the parish of Vermilion, in which was the claimant's domicile, was not exempted from the general ravages of war.

The property of alien residents, like that of natives of the country, when in the track of war "is subject to war's casualties, and whatever in front of the advancing forces that either impedes or may give them aid when appropriated, or which, if left unmolested in their rear, might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents, and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting, and when actual positive war is in progress the commander of the armies in the field must be the judge of the existing exigencies and necessities which dictate such action."

This is believed to be the universal rule at the present day; it is that which has been followed by the Governments of Europe in recent wars. In the case of the Franco-Prussian War of 1870-71, Earl Granville, then secretary of state for foreign affairs of Great Britain, adhered to this rule in regard to British subjects resident in France during the time of the Prussian invasion of France, and it is known that British subjects then resident in France, and who were in the track of the war, lost property to the amount of many millions of dollars. * * *

After careful consideration, I have been unable to find any just reason in the facts set forth by Mr. Melebeck, even if the proofs which he alleges were at hand, why his claim in the present instance should be made an exemption to the general rule.

Accept, sir, the renewed assurance of my high consideration.

FREDK. T. FRELINGHUYSEN.

See opinion of Attorney-General Stanbery, 12 Op., 21, "Aliens must suffer the fortunes of war." (Note 5.)

FUNDAMENTAL DIFFERENCES IN THE COMMISSION.

The foregoing observations constitute, it is believed, a correct outline of those opinions reached by the Commission which affect probably four-fifths of the claims presented. The magnitude of those claims, the ability and force with which eminent counsel have discussed the questions, and the differences thereon existing among the members of the Commission justify an extension of this opinion, even at the risk of repetition and long exposition.

Any inquirer seeking to review and test the soundness of the conclusions of the Commission, as stated by Commissioners Diekema and Wood and in this opinion, can not fail to notice the radical opposition on vital questions between those conclusions and such as have been reached by Commissioners Maury and Chambers. The irreconcilable differences of opinion developed must be carefully and candidly investigated before anyone can hope to arrive at a correct and true result.

FIRST PRINCIPAL DIFFERENCE. RULE OF ALLOWANCE THAT ONLY CLAIMS GOOD AGAINST SPAIN ARE TO BE PAID.

The first fundamental proposition of the Commission is that no award can be made in favor of any claim which an international tribunal of arbitration applying principles of international law would not adjudge to have been a valid claim against Spain at the date of the treaty of peace.

CHANGE OF POSITION OF THE CLAIMANTS.

The correctness of this proposition no one seemed to doubt until long after the organization of the Commission. Commissioner Wood has cited the explicit declarations of such learned counsel for the claimants as Messrs. Soley and Moore, filed April 17, 1902.

Mr. Soley said:

The Commission is to determine primarily the question what amount Spain should have paid to the United States for each of these claims had the United States not assumed their payment. (Brief, pp. 5-6.) It is, therefore, the liability of Spain for indemnity that this tribunal is to determine.

Mr. Moore said:

It is obvious that the Commission is to consider the claims precisely as if they still constituted existing demands against the Government of Spain. (Brief, p. 2.)

Messrs. W. E. Curtis and John G. Carlisle, in their brief, also filed April 17, 1902, said:

There can be no doubt that under the provisions of this article the United States is under the same liability to indemnify its citizens for injuries suffered by them during the late insurrection in Cuba as Spain would have been had her responsibilities not been assumed by the United States. (Brief for Rosario Sugar Co., p. 13.)

In addition, the brief of Messrs. Sullivan and Cromwell, filed on the same date by Mr. William V. Rowe, stated the case as follows:

To establish the liability of the defendant it is only necessary to prove that at the time of the treaty of peace Spain was liable for those acts of the Cuban insurgents by which the property of the claimant was destroyed. * * * It is obvious that at the several times when the property of this claimant was destroyed by the insurgent force in Cuba this claimant acquired no claim for redress against the United States. Its claim for redress, if any, and for satisfaction for the losses inflicted upon it, was against the Government of Spain. Whether this claimant had such claim against Spain is now to be considered, *and it is the only question to be considered*. If by reason of such acts of the insurgents this claimant acquired no claim for redress and satisfaction for its losses against Spain, that is an end to the question, for it is a self-evident proposition that it can make no claim against the United States which was not a valid claim against Spain at the time of the ratification of the treaty of peace of December 10, 1898. On the other hand, it is equally self-evident that this claimant is not prejudiced by the circumstance that the United States has substituted itself in the place of Spain as the defendant in this proceeding. By Article VII of the treaty it was provided, etc. * * * It is then the claim which this claimant had against Spain which is the subject-matter of this inquiry.

In Messrs. Page and Conant's brief of April 17, 1902, pages 74 and 78, it is said:

The United States is bound to pay "every claim of an American citizen for damages to his property in Cuba during the late insurrection the payment of which could have been justly demanded of Spain before the treaty of 1898; any claim the payment of which could in equity and good conscience have been demanded of Spain at the time of the treaty of Paris."

After these briefs had been filed the reply brief for the Government was presented—on May 5, 1902—and this forcefully restated

and emphasized the contention of the defense that Spain was not liable according to the principles of international law for damages done by the Cuban insurgents in an insurrection which had gone beyond control nor for damages done by the soldiers of Spain in efforts to suppress that insurrection.

A new and different basis of allowance was thereupon conceived and pressed by the strong and astute counsel for claimants. On June 2, 1902, Mr. Carlisle in his oral argument announced for the first time in any noticeable manner the new contention of claimants that the general principles of international law had nothing to do with the claims pending before the Commission. These were his words:

The question as to the original liability of Spain under international law is wholly immaterial in the controversy between the citizen and the United States;

and from the time of this announcement the new proposition was urged by all the counsel for the claimants.

The most careful consideration which the majority of the Commission have been able to give to this final position of the claimants does not reveal to them any safe basis for decisions upon claims other than the requirement that every claim to be now good against the United States must have been a good claim against Spain when released by the treaty of peace.

THE LANGUAGE OF THE TREATY AND STATUTE IS DECISIVE.

The language of the treaty and of the statute which gives the Commission all the powers which it possesses is important and controlling in this argument. As is customary in a treaty making peace at the close of a war, the United States and Spain mutually released all private claims against each other, including all claims for indemnity for the cost of the war; and then the United States alone agreed to "adjudicate and settle the claims of its citizens against Spain relinquished in this article."

The United States law making provision for adjudication literally followed the treaty. This Commission was directed to receive, examine, and adjudicate the claims which the United States had agreed to adjudicate and settle by the seventh article. Then followed the unmistakable principle of adjudication:

It shall adjudicate said claims according to the merits of the several cases, the principles of equity, and of international law.

It is difficult to conceive that under this language any argument worthy of attention could be made to show that the United States bound itself to pay any claims except those which at the time of making the treaty were valid claims against Spain according to the principles of international law. Yet such an argument has been forcefully

stated by counsel as able and eminent as are to be found in the Union, and pressed with vigor, eloquence, and apparent sincerity, and has found acceptance with two of the members of the Commission.

DIFFERENT AND ERRONEOUS RULES PROPOSED.

Endeavoring, therefore, to treat the contention as serious, we find it useful to examine the various principles of adjudication which it is sought to substitute for those principles of international law which, being applied to the pertinent facts, will determine the primary liability or nonliability of Spain and consequently the present liability or nonliability of the United States.

FIRST ERRONEOUS RULE OF LIABILITY SUGGESTED: THAT ALL CLAIMS RELINQUISHED MUST BE PAID.

A rule of allowance which has been suggested is that all claims that were released must be paid. The payment must be as broad as the relinquishment.

ARTICLE 7. The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind of either Government, or of its citizens or subjects against the other Government. * * * The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

The argument is simple enough. Undoubtedly every claim pending before this Commission was relinquished, and the claimant by the action of his own Government has lost all right against Spain. Therefore the United States, which has relinquished every claim, must pay every claim. But unfortunately for the argument the United States did not agree to pay every claim which it relinquished, but only to adjudicate and settle all claims; and the act of Congress directs that the adjudication shall be made according to the principles of international law.

THIS SAME ARGUMENT MADE AND REJECTED BY THE COMMISSION OF 1819.

Fortunately this question has been once raised and quite effectually disposed of, as has been shown by Commissioner Wood.

By the treaty of February 22, 1819, between the United States and Spain the two nations reciprocally renounced all claims for damages or injuries which they or their citizens and subjects might have suffered. The renunciation of the United States was specified as applying (1) to all injuries provided for in the annulled convention of 1802, (2) to all claims for losses by French seizures of property condemned as prize in Spanish territory, (3) to all claims on account of the suspension of the right of deposit at New Orleans, (4) to all claims on account of Spanish seizures at sea, and (5) to all claims of citizens of the United States statements of which soliciting the interposition of

the United States had been presented to Spain; and a domestic commission of the United States was provided for to adjust the claims according to the principles of justice, "the laws of nations," and the treaty of 1795; and the United States agreed to provide for the payment of claims which might be admitted and adjusted by the commission the sum of \$5,000,000.

Commissioner Wood has fully stated the decision of the above domestic commission—that a claim was not to be paid merely because it had been relinquished, but must be shown to be a good claim, and such as the Spanish Government, even if the treaty had never been made, ought to have satisfied according to the "laws of nations" and the treaty of 1795.

It is impossible to resist the correctness of this decision or to make the slightest distinction between the two cases. The United States agreed with Spain in 1898, as in 1819, to release all claims and to pay those which would stand the test of an adjudication to determine whether they were good claims against Spain according to the principles of international law.

FRENCH SPOILIATION CLAIMS.

In like manner the Congress of the United States has dealt with the French spoliation claims—claims of our citizens released by us to France, and which we, therefore, became bound to adjudicate and settle.

In the second article of the convention of 1800 with France, in article 2, as first signed by the French plenipotentiaries on September 30, 1800, it was provided that there should be further negotiations, at a convenient time, upon the differences between that nation and the United States respecting the former treaties of 1778 and the convention of 1788, and "upon the indemnities mutually due or claimed," and that until agreement the treaties and convention should have no operation.

On February 3, 1801, the United States Senate consented to the treaty "provided the second article be expunged," and President Adams on February 18 ratified it "excepting the second article," which he declared to be expunged and of no force or validity.

On July 31, 1801, the "First Consul of France" consented to "the retrenchment of the second article," but added, "provided that by this retrenchment the two States renounce the respective pretensions which are the object of the said article."

(Signed)

BONAPARTE.

On December 21, 1801, President Jefferson promulgated the convention as having been fully ratified by the Senate on December 19, 1801.

It being justly claimed by United States citizens that by the above renunciations their claims against France for spoliations by French

cruisers were released and canceled, efforts were made to secure the passage of appropriate acts of Congress for the adjudication and settlement of the claims. An act passed by Congress was vetoed by President Polk on August 8, 1846 (4 Messages, 466); another act was vetoed by President Pierce on February 17, 1855 (5 Messages, 307); but on January 20, 1885, an act passed by Congress was signed by President Arthur (23 Stats., 283). That act reads as follows:

* * * That such citizens of the United States, or their legal representatives, as had valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations * * * may apply by petition to the Court of Claims, * * * that the court shall examine and determine the validity and amount of all the claims. * * * They shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United State applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor. * * * Such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimant or Congress.

In the French spoliation case of *Gray v. United States* (21 Ct. Cls. Reps., 340), the court, by Davis J., stated propositions as follows:

"In 1885 an act is passed authorizing American citizens having '*valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations,*' prior to the treaty of 1800, to bring suit, and directing this court to '*determine the validity and amount*' thereof.

"I. The power of this court to grant redress in the French spoliation cases is necessarily limited by the terms of the *act 20th January, 1885* (23 Stat. L., 283), conferring jurisdiction.

"II. The act casts upon the court the duty of determining judicially both that the French seizures were '*illegal*' and the American claims are '*valid*.'"

The court also treated the question as follows (p. 345):

Good or bad, not one of these claims is enforceable but by the consent of the Congress, and the Congress can affix to that consent such condition as in their wisdom seems just and for the best interests of the Republic. The remedy now granted is an examination and advisory report by the judiciary, to be followed by a decision by the legislative branch of the Government.

It has been said that the validity of the claims as a class is admitted by the act, and this court should confine the examination to each individual claim for the purpose only of determining whether it falls within the class. This is understood to be in effect the argument on behalf of some of the claimants. Our labor and responsibility would be greatly lightened could we agree with this proposition, but the act of Congress seems clearly to negative the contention and to throw upon us the duty of investigating the validity of these claims against France and the assumption of them by the United States. It requires us to examine, not claims in a specified category or known by a generic name, not even "claims" simply, but "valid" claims against France, and valid claims arising not merely from captures, detentions, seizures, condemnations, and confiscations, but from acts of this nature which were "illegal." The validity of the claims, as against France, is the very first condition

imposed by the legislature upon the grant of remedy. The claims must have been "valid" obligations existing at the time and which this Government had the right to enforce diplomatically before they come within the purport of the statute.

Later in the French spoliation case of *Cushing v. United States* (22 Ct. Cls. R., 1), the court (by Davis, J.) stated propositions as follows:

"I. The French spoliation cases can not be maintained as subjects of legal right founded on municipal law; but Congress with full knowledge of the law and the facts, directed that they be investigated and determined under a different and broader rule, viz, '*According to the rules of law, municipal and international, and the treaties of the United States applicable to the same,*' act 20th January, 1885. '23 Stat. L., 283.)

"II. The question, What are '*valid claims to indemnity upon the French Government,*' is international and not within the scope of ordinary judicial inquiry, and is to be measured by rules which relate to the rights and obligations of nations."

* * * * *

"V. It is the purpose of the spoliation act that the court shall determine whether each claim brought before it is valid as against France, and whether the United States became liable over to the individual."

The court further make a statement as follows:

The statute says that those citizens or their legal representatives who had "valid claims" of a specified class upon the French Government, arising out of certain illegal acts committed prior to the ratification of the treaty of 1800, may apply to this court (sec. 1); we are then to determine the validity and amount of these claims "according to the rules of law, municipal and international, and the treaties of the United States applicable to the same," but we can not enter judgment; on the contrary, after the hearing we may only report to the Congress such conclusions of fact and law as in our opinion may affect the liability of the United States for these claims (secs. 3, 6), and this report is binding on neither the claimant nor the Congress (sec. 6).

The first question presented, then, is as to the validity of the claims against France. This is an international question not within the scope of ordinary judicial inquiry, and is to be measured by rules of law well known, thoroughly recognized, and often enforced, but which in the very nature of things are not, in the absence of special legislative authority, presented to, argued before, or passed upon by the judicial departments of governments. These rules of law relate to the rights and obligations of nations, not to the title to property, nor to the rights of individuals between themselves, nor yet to the rights of individuals against their own governments.

SECOND ERRONEOUS RULE OF LIABILITY SUGGESTED; THAT CLAIMS MUST BE PAID BECAUSE PRESENTED TO SPAIN WITH AFFIRMATION OF THEIR JUSTICE.

Another suggested rule of allowance is that all the claims that were presented by our Secretary of State to Spain should be paid, or, at least, that all the various classes of claims presented should be recognized as due and payable, on the ground that they were by presenta-

tion declared by the executive department of our Government to be just claims against Spain, so that the United States is now bound not to dispute any of them.

SECRETARY OLNEY CAREFULLY REFUSED TO AFFIRM THEIR JUSTICE.

It is fatal to this rule of adjudication that the Secretary of State did not present the claims with assertions, either express or implied, that he had ascertained them to be just. On the contrary, the State Department officials were extremely careful not to do this. A very significant formula was repeatedly used in giving notice to Spain of the numerous claims. After naming the various claimants and stating their alleged grounds of claim Secretary Olney said:

The facts set forth as regards these claims indicate that the rights granted by international law and by treaty to citizens of the United States residing in Cuba have not been observed by the Spanish authorities in that island. It is hoped that the Spanish Government will give them as early consideration as is practicable and take measures to prevent any further infraction of the rights of our citizens who may be within its jurisdiction. (Secretary Olney to Minister Taylor, May 5, 1896; same to same, June 5, 1896.)

If any implication of an assertion that the claims thus presented were well founded—were just and legal obligations of Spain—could be drawn from the cautious language above recited, such implication is negatived by the further correspondence. The Duke of Tetuan discussed all the claims at length, acknowledged liability in no cases, denied liability and refused to investigate in some cases, and admitted to investigation certain other cases; but as to these last cases he said that in so admitting them to investigation “no opinion is advanced regarding the propriety of the demand and much less can it signify in any sense the implicit acknowledgment, or even in principle, of the responsibility of the Government of His Majesty and of the right or justice of the claims themselves.” (Tetuan to Taylor, September 29, 1896.)

Later the Duke, as to certain claims—seven claims based upon damages done by the insurgents—said that in no way could the Spanish Government be made to answer therefor, “that being contrary to the doctrines set forth by the principal authors of international law and to the very opinion expressed on several occasions by the Washington Cabinet,” and he added that the claims “can not be admitted even for the purpose of any kind of investigation upon them.”

To these enunciations of the Spanish Government Secretary Olney made a spirited reply to the effect that Spain had not been asked to pay, but only informed of the claims, and that therefore the denial of obligation and refusal to investigate was “at this stage premature and inadmissible;” that at the proper time the United States would examine the claims of which Spain had been given notice and deal with them

according to the law and the facts as they might appear, but that at that time the United States would not consider the question of their validity. He concluded thus: "With respect to these unrepresented claims everything is reserved."

The importance of this letter of Secretary Olney makes expedient its recital in full, as follows:

DEPARTMENT OF STATE,
Washington, December 29, 1896.

HANNIS TAYLOR, Esq., etc.

SIR: Your dispatch No. 614 of the 15th instant, inclosing copy of a note from the Duke of Tetuan in relation to the claims against Spain mentioned in the Department's No. 575 of September 21 last, has been received.

The Duke of Tetuan denies obligation to pay any of these claims, on the ground that the damage was done by Cuban insurgents. You are requested to say in reply, pursuant to instruction No. 620 of the 4th instant, that no demand for payment has been made upon any of the claims referred to, but that you were simply instructed "to inform the Spanish foreign office that the following claims against the Spanish Government had been presented to the Department by persons residing or owning property in Cuba and claiming the protection of the United States."

Spain has not been called upon to pay or to acknowledge obligation to pay these claims, the general denial of obligation to pay them, or to inquire into the facts upon which they are based, made by the Duke of Tetuan, is at this stage premature and inadmissible.

At the proper time all the Cuban claims of which Spain has been given notice, but which she has not been called upon to pay, will be examined, each upon its individual merits, and dealt with according to the law and the facts as they appear to this Government. To such as may be then presented, with all the facts attainable, for payment by Spain, that Government will be at full liberty to make such defense as it may seem proper. At this time the United States can not consider the question of their validity, nor assent to any proposition of law as affecting or having any bearing upon the rights of the claimants. With respect to these unrepresented claims everything is reserved.

I am, etc.,

RICHARD OLNEY.

Notwithstanding the overwhelming negation by the foregoing letter of the assertion that the United States has recognized substantially all the claims, at least all the classes of claims, as binding obligations upon Spain and is now therefore estopped to dispute their justice, the assertion has been persistently repeated in various forms. The force of the letter has not been sufficiently recognized by the counsel for the claimants or the dissenting commissioners.

In demonstrating so much at length the fact that the United States have never committed the Government to an assertion of the validity of the claims under consideration, we do not mean to admit that if such an assertion had been made this Commission would be bound thereby, acting as a judicial tribunal directed by Congress to adjudicate the cases according to the principles of international law. If, as to particular cases or as to classes of cases, the executive officers of the United States had ever reached opinions of law or fact favorable or unfavorable to the claims, their conclusions would receive serious con-

sideration by the Commission but would not control its decisions as an independent judicial tribunal. This point is fully considered in another connection.

THIRD ERRONEOUS RULE OF LIABILITY SUGGESTED; THAT CLAIMS MUST BE PAID BECAUSE THEY WERE STATED AS CAUSES OF WAR; WAR WAS SUCCESSFUL, AND SPAIN PAID THE CLAIMS BY TERRITORY, SO UNITED STATES IS TRUSTEE FOR CLAIMANTS.

The rule of allowance urged upon the Commission with the greatest pertinacity is, in exact substance, this:

That the United States made these claims a cause of war against Spain, and being successful, demanded and received from Spain an indemnity for the purpose of satisfying such claims, and therefore is specially bound to pay them; is, in fact, a trustee holding valuable property received for the benefit of the claimants, which it would be dishonorable to keep without paying the claims of the beneficiaries for whom it was designed. (Note 6.)

NO NEED OF SUCH RULE, EXCEPT AS TO CLAIMS NOT OTHERWISE GOOD ACCORDING TO INTERNATIONAL LAW.

While considering this suggested rule of allowance it should be constantly borne in mind that such a rule is of no value or importance, except for the purpose of compelling the payment of claims which would fail if judged by the general principles of international law. In connection with claims which are valid according to such principles, there is no occasion for inquiring whether the United States went to war on account of the claims, or received indemnity to enable her to satisfy the same.

CLAIMS GOOD ACCORDING TO INTERNATIONAL LAW UNITED STATES WAS BOUND TO PAY, BECAUSE SHE RELEASED THEM, WHETHER THEY WERE OR NOT CAUSES OF WAR AND WHETHER OR NOT UNITED STATES RECEIVED PAYMENT THEREFOR IN ANY FORM FROM SPAIN.

By releasing the claims to Spain, whatever the circumstances or whatever the reasons, the United States bound the Government to adjudicate and settle them. There was no need of any promise to Spain that there should be adjudication and payment; this obligation followed from a generally accepted principle of the nations—that releasing private claims involves the assumption of those claims and their payment, if they are good claims, against the nation to which they were released. (Meade's case, 2 Ct. Cls., Reps. 275 and 249; 7 Ibid., 182; 76 U. S., 724. French spoliation cases, 21 Ct. Cls., 340; 22 Ct. Cls., 1.)

Therefore, concerning claims valid according to the general principles of international law, it is not necessary to examine the proposed

rule of allowance. The question is, Should such a rule be adopted for the purpose of so applying it as to require the payment of claims which otherwise would not be justly due according to the principles of international law?

This doubt first and immediately arises: Are the facts accurately stated in the proposed rule and exhibited in their due proportion to all the facts of our war with Spain? During the prolonged hearing of the arguments it was impossible to avoid the impression that there was exaggeration of the extent to which these claims entered into the controversies which preceded the war and the negotiations which resulted in peace.

To say that the United States went to war in order to collect these claims detracts seriously from the high character which it is to be hoped the war will maintain in history. The war begun by the United States against Spain was the most disinterested conflict hitherto known in the history of the world. Almost our whole people had been waiting for the appropriate time to ask and require Spain to relieve Cuba from her ancient and harsh methods of government, to surrender her sovereignty over the island to the people thereof so that it might become a new American republic; to induce Spain to cease to hold and misgovern colonies in this hemisphere. Never was self-interest less considered in a war of one nation to secure and maintain the freedom and independence of an alien people despotically governed and systematically oppressed.

These are the great facts of the American-Spanish war of 1898; so that the proposed and accomplished liberation from the rule by oppression of ten millions of people in two hemispheres is not to be known in any sense as a war begun and carried to a successful termination for the purpose of collecting the money claims of American citizens, however meritorious those claims may have seemed to be.

The extent to which the subject of the claims entered into the war is easily seen. They were not a conspicuous part of the causes of the war. Secretary Olney had declined even to commit himself to an assertion that they were just. The President and the people were not indifferent to the claims, the justice of which remained to be proved, but it is clear that so far as the prevailing injuries to American citizens happening in Cuba during the insurrection from 1895 to 1898 received consideration, the principal object of the President was to induce Spain, by prompt suppression of the rebellion or otherwise, to bring to a close those injuries, to prevent their repetition in the future, and not to collect damages for those which had been committed. (Note 7.) Complaints, remonstrances, and efforts to this end were more important and necessary if Spain was not liable according to the principles of international law, to make compensation for damages done, than if she were thus liable. The President and everyone knew.

that, except in special cases, Spain would not be liable for damages done by the insurgents or by her own troops, and therefore the President was the more urgent to have the conflict brought to a close even if at last by a war with Spain, to be begun for all the reasons which could be fairly assigned. So far as direct injuries to Americans were involved, it was much more our national duty by remonstrance, and if necessary by strong measures, to cause to cease such injuries as compensation could not be collected for than to collect those claims where a liability to pay them could be justly asserted.

Let us now carefully inquire in what way the collection of private claims for damages done was stated as one of the causes of the war. In what way was property or money demanded and received from Spain in order to satisfy the money claims of American citizens against Spain for damages done during the insurrection so as to make the United States a trustee either for claims that were due according to law or those which had been merely presented for consideration.

President Cleveland, in his message of December 2, 1895 (IX, 636), considered the new insurrection in Cuba and declared the duty of our Government to maintain neutrality notwithstanding "the traditional sympathy of our countrymen with a people who seem to be struggling for larger autonomy and greater freedom." He spoke of American interests only by referring to "our loss and material damage" consequent upon the futile endeavors of Spain to restore peace and order, and by saying that "military arrests of citizens of the United States in Cuba have occasioned frequent reclamations."

In his message of December 7, 1896 (IX, 716), he discussed the continued conflict at length; insisted that Spain ought to establish a genuine autonomy in Cuba; suggested the friendly assistance of the United States, and intimated that "it can not be reasonably assumed that the hitherto expectant attitude of the United States will be indefinitely maintained," but that a time may arrive when our Government will be constrained to take action to secure peace. The reasons for possible intervention are stated to be "the spectacle of the utter ruin of an adjoining country by nature one of the most fertile and charming on the globe," and "considerations of humanity and a desire to see a rich and fertile country intimately related to us saved from complete devastation." The allusions to our own concern with Cuba are comprised in assertions that "our actual pecuniary interest in it is second only to that of the people and Government of Spain," American investments being from 30 to 50 millions, and our volume of trade being, in 1889, 64 millions; in 1893, 103 millions; and in 1894, 96 millions; and that the Government "is constantly called upon to protect American citizens; to claim damages for injuries to persons and property now estimated at many millions of dollars."

President McKinley in his message of December 6, 1897 (X, 127),

treats at length the "most important problem" of our Government, "its duty toward Spain and the Cuban insurrection," and after a recital of conditions, considers the questions of recognition of belligerency, of recognition of independence, and of intervention, advises against the first two and a waiting policy before resorting to the last, concluding that the near future will demonstrate whether a righteous peace is likely to be attained. "If not, the exigency of further and other action by the United States will remain to be taken." His references to our self-interest are general and incidental, and he specially mentions only his success in obtaining the release from arrest and long imprisonment of 22 American citizens.

On March 28, 1898, President McKinley transmitted to Congress the report of the court of inquiry concerning the destruction of the battle ship *Maine* in Havana Harbor on February 15, "not doubting that the sense of justice of the Spanish nation" would result in honorable action. On April 11, 1898, President McKinley sent to Congress his notable message on Cuban affairs, recommending intervention (1) to end the war in Cuba, and (2) to secure in the island a stable government (X, 147). He formulates the grounds for intervention, which, in full, are as follows:

The grounds for such intervention may be briefly summarized as follows:

First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and is therefore none of our business. It is specially our duty, for it is right at our door.

Second. We owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection.

Third. The right to intervene may be justified by the very serious injury to the commerce, trade, and business of our people, and by the wanton destruction of property and devastation of the island.

Fourth, and which is of the utmost importance. The present condition of affairs in Cuba is a constant menace to our peace and entails upon this Government an enormous expense. With such a conflict waged for years in an island so near us and with which our people have such trade and business relations; when the lives and liberty of our citizens are in constant danger and their property destroyed and themselves ruined; where our trading vessels are liable to seizure and are seized at our very door by war ships of a foreign nation; the expeditions of filibustering that we are powerless to prevent altogether, and the irritating questions and entanglements thus arising—all these and others that I need not mention, with the resulting strained relations, are a constant menace to our peace, and compel us to keep on a semiwar footing with a nation with which we are at peace.

The Congress, in the joint resolution of April 20, 1898 (X, 155), which was the real declaration of war that was formally declared on April 24 to have begun on April 21, gave the reasons for going to war, which are familiar to every one, as follows:

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the

people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battle ship, with 266 of its officers and crew, while on a friendly visit in the harbor of Havana, and can not longer be endured, as has been set forth by the President of the United States in his message to Congress of April 11, 1898, upon which the action of Congress was invited.

Our Paris treaty commissioners, on October 27, 1898, in an annex to protocol No. 10 (treaty book 106), formally and fully, but concisely, stated to Spain the causes which led the United States to make war on Spain, as follows:

It is urged in the Spanish commissioners' memorandum that the United States, erroneously believing in the justice of the cause of Cuban independence, made it its own and took up arms in its behalf. "The United States," so declares the Spanish memorandum, "made a demand on Spain, and afterwards declared war on her, that Cuba might become free and independent." The causes of the demand of the United States for the termination of Spanish sovereignty in Cuba are amply shown in the history of the events which preceded it. For many years the United States patiently endured a condition of affairs in Cuba which gravely affected the interests of the nation. As early as 1875 President Grant called attention to all its dread horrors and the consequent injuries to the interests of the United States and other nations, and also to the fact that the agency of others, either by mediation or by intervention, seemed to be the only alternative which must sooner or later be invoked for the termination of the strife. During that Administration, notwithstanding that it was clearly intimated to Spain that the United States could no longer endure the situation, which had become intolerable, no unfriendly action was taken, and for ten years it suffered all the inconvenience and deprivation, destruction of trade, and injury to its citizens incident to the struggle, which was ended by the peace of Zanjón, only to break out again and to be waged with every feature of horror and desolation and profitless strife which had characterized the former struggle.

President Cleveland, in his annual message of 1896, was constrained to say to the Congress of the United States: "When the inability of Spain to deal successfully with the insurrection has become manifest, and it is demonstrated that her sovereignty is extinct in Cuba for all purposes of its rightful existence, and when a hopeless struggle for its reestablishment has degenerated into a strife which means nothing more than the useless sacrifice of human life and the utter destruction of the very subject-matter of the conflict, a situation will be presented in which our obligations to the sovereignty of Spain will be superseded by higher obligations, which we can hardly hesitate to recognize and discharge." Throughout President Cleveland's Administration this situation was patiently endured at great loss and expense to the United States, which then and at all times was diligent in maintaining the highest obligations of neutrality through the vigilance of its Navy and its executive and judicial departments.

The present Chief Executive of the United States, in his first annual message in 1897, again called attention to the disastrous effects upon our interests of the warfare still being waged in Cuba. The patient waiting of the people of the United States for the termination of these conditions culminated in the message of April 2, 1898, of the President to Congress, in which he said: "The long trial has proved that the object for which Spain has waged the war can not be attained. The fire of insurrection may flame or may smolder with varying seasons, but it has not been, and it is plain that it can not be extinguished by present methods. The only hope of relief and repose from a condition which can no longer be endured is the enforced pacification of Cuba. In the name of humanity, in the name of civilization, in behalf of endangered American interests which give us the right and the duty to speak and to act, the war in Cuba must stop."

Acting upon this message, the Congress of the United States, in the resolution approved by the President April 20, 1898, which has been so often referred to in the memorandum submitted by the Spanish commissioners, based its demand that the Government of Spain relinquish its authority and government in the island of Cuba and withdraw its forces from Cuba and Cuban waters upon conditions in Cuba (so near the United States) which were declared to be such that they could no longer be endured.

It is not necessary to recite the record of the events which followed that demand, well known to the members of this Commission, and which are now a part of the history of the world. It is true that the enforced relinquishment of Spanish sovereignty will result in the freedom and independence of the island of Cuba and not in the aggrandizement of the United States. This résumé of events which led to the United States taking up arms is not made to wound the susceptibilities of the Spanish nation or its distinguished representatives upon this Commission, but in view of the truth of history and the statements made in the memorandum submitted by the Spanish commissioners, less could not be said by the representatives of the United States. Not having taken up arms for its own advancement, having refrained from acquiring sovereignty over Cuba, the United States now seeks to attain a peace consistent with its ends and purposes in waging war. In asking as a victorious nation for some measure of reparation, it has not emulated the examples of other nations and demanded reparation in money for the many millions spent and the sufferings, privations, and losses endured by its people. Its relations to Cuba have been those of a people suffering without reward or the hope thereof.

The insignificant extent to which the money claims of American citizens against Spain now under adjudication by this Commission were made causes of the war against Spain being apparent from the above recital, attention should now be directed to learn to what extent those claims entered into the negotiations preceding the treaty of peace. On July 30, 1898, when the peace negotiations at Washington were going forward, which resulted in the peace protocol of August 12, 1898, Secretary Day wrote the Spanish minister of state a letter of July 30, 1898 (Treaty Book, p. 274), stating what the terms of the President would be, as follows:

The United States will require:

First. The relinquishment by Spain of all claim of sovereignty over or title to Cuba and her immediate evacuation of the island.

Second. The President, desirous of exhibiting signal generosity, will not now put forward any demand for pecuniary indemnity. Nevertheless, he can not be insensible to the losses and expenses of the United States incident to the war, or to the claims of our citizens for injuries to their persons and property during the late insurrection in Cuba. He must, therefore, require the cession to the United States and the immediate evacuation by Spain of the island of Porto Rico and other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrones, to be selected by the United States.

Third. On similar grounds the United States is entitled to occupy and will hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines.

The Spanish commissioners at Paris on October 21, 1898 (Protocol 7, Treaty Book 58), submitted among others a proposition ceding to the United States Porto Rico and Guam, the offer beginning as follows:

ARTICLE IV.

As compensation for the losses and expenses occasioned the United States by the war, and for the claims of its citizens by reason of the injuries and damages they may have suffered in their persons and property during the last insurrection in Cuba.

On October 21, 1898, in the annex to the foregoing proposition (see Protocol No. 9, Treaty Book 92) the Spanish commissioners gave the reasons for the form in which they had put Article IV:

Article VI of the Spanish draft did not set forth the reason of the cession made by Spain in favor of the United States of the island of Porto Rico, the other Spanish Antilles, and of the island of Guam in the Marianas. That reason nevertheless was explained in the dispatch of the Secretary of State of the United States in his answer to the message transmitted to him by the Spanish Government. Said dispatch states that the President of the Republic did not demand the payment of any war indemnity, owing to his desire to give testimony of signal generosity, and then it says:

Nevertheless he can not be insensible to the losses and expenses of the United States incident to the war, or to the claims of our citizens for injuries to their persons and property during the late insurrection in Cuba. He must, therefore, require the cession to the United States and the immediate evacuation by Spain of the island of Porto Rico and other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrões, to be selected by the United States.

The island designated by them was the island of Guam.

The Spanish commissioners have now decided to change the text of the article as formerly framed by them, and offer as a substitute another article which will leave on record the reason of the cession. It is quite certain that the American commission will agree with the Spanish commission in the advisability of preventing the United States from being shown in the treaty as acquiring gratuitously the said islands. Here is the new text of the article:

On October 27, 1898 (protocol No. 10, Treaty Book 95), proceedings took place as follows:

The president of the Spanish commission * * * asked whether the American commissioners would object to inserting in the article in which the cession of Porto Rico and the other islands in the West Indies and the Island of Guam was made, or in any of the other articles of the treaty, a statement that the cession was made as indemnity for the expenses of the war and the injuries suffered during it by American citizens?

The president of the American commission replied that the articles should stand as when they were accepted, and be considered as disposed of for the present, adding further that the American commissioners did not mean to be understood that it should not appear in some proper form in the treaty that the cession of Porto Rico and the other islands above referred to was on account of indemnity for the losses and injuries of American citizens and the cost of the war. This view had been expressed in the note addressed to the Spanish Government containing the demand of the President of the United States, and the American commissioners recognized the force and meaning of that demand.

The president of the Spanish commission said that it was not his intention now to discuss this point, but to state his desire that the question and the answer to it should be entered in the protocol.

It was on the above date that the American commissioners stated to the Spanish commissioners the causes of the war hereinbefore given in full.

The American commissioners on November 16, 1898 (Annex to Protocol No. 15, Treaty Book, page 211), made a statement as follows:

The American commissioners are also authorized and prepared to insert in the treaty, in connection with the cessions of territory by Spain to the United States, a provision for the mutual relinquishment of all claims for indemnity, national and individual, of every kind, of the United States against Spain and of Spain against the United States that may have arisen since the beginning of the late insurrection in Cuba and prior to the conclusion of a treaty of peace.

The Spanish commissioners on November 22, 1898 (annex to protocol No. 16, Book 217), among other questions, made inquiry as follows:

Third. The Secretary of State having stated in his note of July 30 last, that the cession by Spain of the island of Porto Rico and the other islands now under Spanish sovereignty in the West Indies, as well as one of the Ladrões, was to be as compensation for the losses and expenses of the United States during the war, and of the damages suffered by their citizens during the last insurrection in Cuba, what claims does the proposition refer to on requiring that there shall be inserted in the treaty a provision for the mutual relinquishment of all claims, individual and national, that have arisen from the beginning of the last insurrection in Cuba to the conclusion of the treaty of peace?

The American commissioners on the same day replied as follows:

While the idea doubtless was conveyed in the note of the Secretary of State of the United States of the 30th of July last that the cession of "Porto Rico and other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrões, to be selected by the United States," was required on grounds of indemnity, and that "on similar grounds the United States is entitled to occupy and will hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines," no definition has as yet been given of the extent or precise effect of the cessions in that regard. The American commissioners therefore propose, in connection with the cessions of territory, "the mutual relinquishment of all claims for indemnity, national and individual, of every kind, of the United States against Spain and of Spain against the United States, that may have arisen since the beginning of the late insurrection in Cuba and prior to the conclusion of a treaty of peace."

By both the commissions on December 5, 1898 (protocol No. 19, Book 230), the articles of the treaty were read "and they were approved by both commissions, which declared them to be final, save as to mere modifications of form, upon which the secretaries-general might endeavor to agree."

The article in the draft of the treaty thus read and approved, being substantially the article proposed by the American commissioners on November 22 (No. 6, which in the final treaty became the seventh article), was as follows (Book 234):

The United States and Spain, in consideration of the provisions of this treaty, hereby mutually relinquish all claims for indemnity, national and individual, of every kind (including all claims for indemnity for the cost of the war) of either

Government, or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late insurrection in Cuba and prior to the ratification of the present treaty.

At the conference on December 10, 1898 (protocol No. 22, Book 260), it appears as follows:

The treaty of peace (annex No. 2) was read and approved and was signed by plenipotentiaries of the two high contracting parties.

In the annex No. 2, read and signed as above, there appears for the first time the closing sentence of Article VII of the treaty, as follows:

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

There was also omitted from the prior draft the words "in consideration of the provisions of this treaty," and there was a transposition of the words "including all claims for indemnity for the cost of the war;" so that the final article reads as follows:

ARTICLE VII.

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

The foregoing being the public record showing the extent to which the claims of United States citizens against Spain were considered as causes of the war, and provided for in the treaty of peace, let us now briefly see what were the results to the United States of the war and the treaty. What, if anything, did she acquire and hold in trust for the claimants now before this Commission? She received Porto Rico and Guam and the Philippines. She gave freedom and independence to Cuba; paid Spain \$20,000,000, as promised at the end of Article III, wherein Spain ceded the archipelago, and expended more than \$300,000,000 as the cost of the war. The actual value received by us for our \$320,000,000 is not at present capable of estimation. The money balance in our favor is more than \$320,000,000.

In clear view of the above facts accurately recited at great length, it does not require much labor to show the vital difference between the case on the point under discussion as stated by counsel for claimants and as it actually stands.

Their statement concisely set forth is: The United States went to war with Spain to collect these claims. When we were victorious we demanded payment of them. Spain paid the claims and we now hold the indemnity money in our hands in trust for the claimants.

The true case is that during the insurrection in Cuba claims of our citizens, not few in number and impressive in amounts claimed, were

brought by us to the notice of Spain but without any assertion of their validity, that question being by us specially held in reserve (Note 8); that during the contentions which preceded the war and in connection with the many other and more important causes of complaint the claims were mentioned generally and without specifying any particular claim or class of claims; that in the carefully stated reasons for the war given by the President no mention whatever was made of the claims; nor in the declaration of war made by Congress on account of the "abhorrent conditions" which had "shocked the moral sense" of our people and had been "a disgrace to Christian civilization;" that in the peace negotiations the claims were only mentioned incidentally in connection with the larger question of indemnity for the cost of the war; that when peace was made the claims were disposed of collectively by the customary release of all claims national or individual of every kind, including all claims for indemnity for the cost of the war; that no money whatever was received from Spain but \$20,000,000 was paid to her; and no property was received from her except a territorial acquisition of doubtful value which, although declared in conferences but not in the treaty to be a cession on account of indemnity for the losses and injuries of American citizens and the cost of the war, was not accompanied by any agreement of the United States to pay the claims, but only by a promise to adjudicate and settle them (in Spanish, "juzgaran y resolveran") and that Congress created a judicial tribunal to make the adjudications and directed it to make its decisions according to the principles of international law. The case stated by the counsel for the claimants is so different from the case actually existing that a mere contemplation of the differences is satisfying.

It is not necessary in rejecting the reasoning of the counsel for the claimants to assert that there may not be a case where a judicial tribunal could hold that a government had become liable to one of its citizens for the amount of a claim which it had specifically presented to another government and insisted upon and actually collected in money, irrespective of the original merits of the claim against the foreign nation. This would naturally be the decision of a domestic tribunal if no specific rules of adjudication were prescribed for the court by the law establishing it. But if in such a case the law creating the tribunal directed it to make an adjudication of the original merits of the claim according to the principles of international law, it would be bound to so adjudicate. If the claim proved to be unjust according to the principles of adjudication laid down by competent authority for the guidance of the court, it would be the moral duty of the government to return the money to the nation from which it came, and not to pay it to an undeserving claimant. In such a case, if the money which has been received is to be by the nation paid to the holder of an unfounded claim, it is the province of the legislature and not of a court to so decide. (Note 9.)

SECOND PRINCIPAL DIFFERENCE—COMMISSION TO ACT ON PRINCIPLES
OF INTERNATIONAL LAW AND FACTS PROVED.

The Commission finds it to be its duty to decide whether the claims presented for allowance are good or bad, valid or unjust, by ascertaining from the consensus of the nations what are the pertinent principles of international law and applying those principles to the facts of the various cases as they appear from judicial notice taken or from proofs presented in the methods customary in judicial tribunals like this Commission. This conclusion seems to the Commission inevitable and without the possibility of serious dispute. But it has been earnestly controverted and possibly needs vindication.

HOW PRINCIPLES OF INTERNATIONAL LAW TO BE ASCERTAINED.

International law is defined to be:

(1) The unanimous approbation of all, or, at least, of many nations, the proofs being continued usage and the testimony of experts. (Grotius 1, De Jure, ch. 1, sec. 14.)

(2) The rules which govern the international life of states. (Twiss, Law of Nations, vol. 1, p. 2.)

(3) The totality of legal rules and institutions which have developed themselves touching the relations of states to one another. (Bulmerincq, Das Völkerverecht, sec. 2.)

(4) The formal expression of the public opinion of the civilized world respecting the rules of conduct which ought to govern the relations of independent nations. (Cairns. Dana's notes to Wheaton, 23.)

(5) The opinions generally received by civilized nations. (Austin, Province of Jurisprudence, 147.)

(6) That collection of usages which civilized states have agreed to observe in their dealings with one another. (Lord Coleridge in the Queen v. Keyn, Law Repts.)

(7) That body of rules accepted by civilized nations as binding and obligatory in their mutual dealings with each other. (Hannis Taylor, Int. Pub. Law, 2, 3.)

(8) The aggregate of rules regulating the intercourse of states gradually evolved out of the moral and intellectual convictions of the civilized world as the necessity for their existence has been demonstrated by experience. (Taylor, Int. Pub. Law, 86.)

(9) The rules which determine the conduct of the general body of civilized states in their dealings with one another. (T. J. Lawrence, Principles of Int. Law, p. 1.)

(10) Certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another * * * and which they also regard as being enforceable by appropriate means in case of infringement. (Hall, Int. Law, 1.)

(11) Part of our law * * * Where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. (Paquete Habana, 175 U. S., 700.) The English common law adopts the fundamental principles of international law and the obligations and duties they impose. (Paquete Habana, 175 U. S., 700.)

(12) "The aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other and to each other's subjects." (Woolsey's International Law, p. 3, sec. 5.) "As soon as a nation has assumed the obligations of

international law, they become a portion of the law of the land to govern the decisions of courts, the conduct of the rulers, and that of the people." (Woolsey's International Law, p. 27, sec. 29.)

(13) "*The rules of conduct regulating the intercourse of States.*" "Grotius considers the law of nations as a positive institution, deriving its authority from the positive consent of all or the greater part of civilized nations, united in a social compact for this purpose. * * * Others define this law to consist only of the usages, customs, and conventions adopted and observed among nations." "*The customary law of nations* is founded on the tacit or implied consent of nations as deduced from their intercourse with each other." (Halleck's International Law, pp. 46, 47, and 51.)

(14) The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. (Grier, J., in the prize cases, 67 U. S., 670.)

In Professor Freeman Snow's Manual of International Law (Naval War College Publication, 1898) is stated the author's definition and scope of international law as follows:

International law, as commonly understood, is that body of rules which governs generally the actions of modern civilized states in their intercourse with one another.

These rules are the outgrowth of the customs arising from the intercourse of nations, of various international agreements, and of the acts of states which have in the lapse of time been accepted as of binding force by the various civilized states of the world. They may be considered as being based upon the moral and intelligent convictions of enlightened mankind.

International law differs from the municipal or national law of individual states in that it does not proceed from any authorized lawmaking power and that it has no superior international tribunal whose functions it is to enforce the law in the case of its infraction. Nevertheless it is obeyed for the most part without question, and it is only upon exceptional occasions that resort is now had to war as a settlement of international disputes. Indeed, many states have adopted international law as a part of their municipal law, and a great majority of the cases that arise under it are adjudicated upon by the courts of law of the individual states. The Constitution of the United States specifically vests in Congress the power to define and punish offenses against the law of nations.

Professor Snow also gives the sources of modern international law as follows:

By the sources of modern international law is meant the places where its rulings and principles are obtained.

The following may be given as the sources of modern international law:

1. The works of great publicists—the text writers of authority. These give both principles and usages.
2. The decisions and conclusions of prize courts, of official international conferences, and of arbitral tribunals.
3. Treaties.
4. State papers of jurists, opinions of attorneys-general, confidentially and otherwise given to their respective governments.
5. Instructions, regulations, and ordinances issued by the states for the guidance of their own citizens or subjects, officers and tribunals.
6. History of wars, negotiations, and current events.
7. The proposed codes and formulated views of voluntary international associations of jurists.

Though an attempt is made by the order of classification to give the relative value of these sources, still in practice, with the different writers and different schools in existence, it is almost impossible to make a rigid distinction.

International usage, however, may be considered as the touchstone which gives life and strength to the principles of international law. When rules apparently sound conflict, then usage, prevailing usage, should determine the rule to follow. (Note 10.)

OPPOSITE IDEA; LAW AND FACTS TO BE SHOWN BY MERE DECLARATIONS
OF THE EXECUTIVE.

In opposition to the foregoing authorities the contention has been made that the question of liability or nonliability must be decided by adopting as binding and conclusive all the declarations which at sundry times and on various occasions the executive branch of the Government of the United States has uttered purporting to state principles of international law and to apply them to facts which were then understood by the Executive to exist.

DECISIONS THEN MIGHT BE MADE ON FALSE PRINCIPLES AND NON-
EXISTENT FACTS—SUCH A DOCTRINE INTOLERABLE.

In other words, the decisions of the Commission must be based upon principles which are contrary to those of international law and are applied to facts which do not exist, if the Executive of the United States has at any time asserted those unsound principles and assumed those nonexistent facts.

The Commission reject any such idea as to the duties of the judicial tribunal upon which its members have the honor to serve. Created by law of Congress as a court to adjudicate certain claims against the United States according to the principles of international law upon evidence to be submitted by the claimants in favor of the claims and by the Attorney-General against the claims, they are bound by no statement of principles of international law made by the Executive of the United States alone which do not accord with the international consensus; nor by any assumptions of fact made by that Executive which were mistaken and erroneous. Congress which made the law can repeal it or modify it. No other power can control or change the functions or duties of the Commission. Any other doctrine is slavish and un-American.

The principal question where it is sought to substitute for the true law and the real facts the declarations of the Executive arises upon General Weyler's concentration and devastation orders. With reference to those orders President McKinley was very explicit. In his message of December 6, 1897 (X, 129), he said:

The cruel policy of concentration was initiated February 16, 1896. The productive districts controlled by the Spanish armies were depopulated. The agricultural inhabitants were herded in and about the garrison towns, their lands laid waste and their dwellings destroyed. This policy the late cabinet of Spain justified as a necessary measure of war and as a means of cutting off supplies from the insurgents. It has utterly failed as a war measure. It was not civilized warfare. It was extermination.

Against this abuse of the rights of war I have felt constrained on repeated occasions to enter the firm and earnest protest of this Government.

In his special message of April 11, 1898 (X, 139), he speaks of "the addition to the horrors of the strife of a new and inhuman phase happily unprecedented in the modern history of civilized Christian peoples" and after reciting the methods of enforcing "the policy of devastation and concentration" and its direful results he adds:

Reconcentration, adopted avowedly as a war measure in order to cut off the resources of the insurgents, worked its predestined result. As I said in my message of last December, it was not civilized warfare; it was extermination. The only peace it could beget was that of the wilderness and the grave.

Notwithstanding these strong expressions of President McKinley, the Commission has decided, as hereinbefore stated, that, as a general principle to govern its decisions, concentration as a prelude to or a part of devastation is allowed by the rules and usages of international warfare, subject to the specified limitations that such reasonable protection as the military exigency will permit must be given to the property and persons of neutral foreigners; that there must be no unnecessary and wanton destruction of property, and that food and shelter and safety from sickness and death and cruelty and hardship must, if possible, be secured, and that there exists a liability for indemnity in any case where it is averred and proved that there has been a violation of these limitations.

Is it now clear that instead of investigating and deciding the various cases according to the above rule, there should be substituted for it the following:

Whenever a concentration caused damages or contributed to damages, Spain was liable, whatever may have been the circumstances of the concentration or the damages done. (Note 11.)

Is this the true rule for the Commission? In every case where a citizen of the United States or his agents left his plantation, which subsequently went to decay and ruin or was devastated by any persons whatever, is there to be no inquiry by the Commission what international law allowed Spain to do in suppressing the insurrection, nor what the additional facts were, because President McKinley said that, as he then understood the facts, what was going on was not civilized warfare? Are these earnest utterances of his sentimental appeal to arms to be the law and the facts upon which, without further investigation or meditation, the Commission is to reach its judgments upon claims?

Whenever, in the future, after crimination and recrimination between nations, a war takes place, and at last peace comes and the nations agree to release each the other from the claims of its own citizens and adjudicate and settle them, and each creates a court for that purpose and instructs it to decide the cases according to the principles of international law, having ascertained the facts by proofs taken, must each tribunal be governed by the impassioned assertions of law and fact

made by its own executive during the ardent contentions which were the prelude to devastation and bloodshed?

President McKinley had been a soldier in the Union Army, he knew of General Ewing's concentration order in Missouri in 1863, and, of course, was familiar with Sherman's march to Atlanta and to the sea, carrying devastation to the homes of the people of the South, and with Sheridan's expulsion of the residents of the Shenandoah Valley, and such devastation of that region that, as he said, a crow flying over it would have to carry his rations with him (as the counsel, who spoke on January 31, 1903, said: "Why, it was the very valley and the shadow of death"), but the President had not then seen and probably did not anticipate the concentration and devastation by United States troops under General Bell in the Philippines. Possibly if he had supposed that in addition to arousing just national indignation, in order to bring on war with Spain for the liberation of Cuba, he was announcing a new principle of international law, and making a finding of facts happening in war which should be conclusive and binding upon United States courts in all future time, he would have withheld or moderated the soul-stirring utterances with which he begun a great war for the freedom and independence of a new nation.

Undoubtedly there was a difference between the devastations of Sherman, Sheridan, Ewing, and Bell, and those of Weyler; in this, certainly that in the former cases the inhabitants who were driven from their homes had broader fields to go to than could be found in the island of Cuba. Doubtless, before an international tribunal adjudicating claims of neutral foreigners Spain might have been held to a heavier responsibility for the severer methods of Weyler than could have been the United States for the methods of her generals. But that this Commission administering international law is forbidden by the just and appropriate indignation and pertinent and effective utterances of President McKinley from ascertaining the true modern rule of international law and applying it to the facts as they may appear or be shown, and must involve Spain and the United States in one common condemnation by a judgment that "Reconcentration was not civilized war, but was extermination" is not a rational conclusion.

The argument that something beside world-wide principles and real facts should be the basis for the decisions of the Commission has gone very far. It is said that we must decide that concentration was not legitimate warfare, because if we were to consider independently the rightfulness or wrongfulness of the concentration orders "we should be passing upon the justice or injustice of our policy in making war upon Spain." (Note 12.) The Commission must view the principles of international law "from its standpoint as an American court." (Note 13.) The judgment of the Executive Department as to the status of the insurrectionists in Cuba "is conclusive." The judgment

of the President that the war waged by Spain was not civilized warfare "is also conclusive." The motives avowed and the recitals of fact made by the President "are beyond criticism by this Commission, which can render no judgment, the effect of which would be to impugn or confute any of such statements." "War settled all the questions involved." (Note 14.) The Commission is "bound not only by the conclusions reached by the political department of the Government * * * but it is also bound by *every fact* upon which the political department of the Government based its conclusions." (Note 15.) "The principle asserted by the victorious state is the law that binds * * *." "If the United States had been defeated in the war with Spain * * * these questions would have been decided adversely to the United States." (Note 16.)

Commissioner Maury's statement is equally positive; that beyond doubt the Commission has no business to inquire whether "as a general principle of international law reconcentration is a legitimate war measure," for the reason that President McKinley in the performance of his duty to give Congress information of the state of the Union, and as the channel prescribed by the Constitution through which the judiciary shall obtain information of what concerns the government in other countries, has "repeatedly condemned the reconcentration policy of General Weyler as cruel and uncivilized warfare."

Commissioner Chambers is quite as clear; that although concentration, "the removal of noncombatant people temporarily to places of safety beyond the sphere of actual warfare need not necessarily be illegitimate warfare," yet the question is here and now purely an abstraction, the political department of our Government having decided that Spain's reconcentration was not civilized warfare, which therefore the Commission, "*following the authority of the Supreme Court,*" is bound to hold.

For these extraordinary positions urged as "principles of international law," which are to govern the decisions of this Commission, pertinent precedents are not cited.

In examining such authorities as it is claimed go to show that the Commission is conclusively bound by all declarations of law and fact made by the Executive of the United States it is important first to notice that all are expressions from opinions rendered in the courts of law of the United States; none are decisions of international commissions nor even decisions of any of the domestic commissions which have adjudicated cases like those before this Commission.

If before an international commission organized to adjudicate private claims against a nation the counsel for the government presenting the claims were to say that because that government had declared that the claims were justly due according to law and fact, therefore the commission was bound by these declarations, the answer of the govern-

ment sought to be charged would properly be that no such estoppel rested upon the commission and that the question whether the claims were justly due according to international law was the fundamental question to be decided by the commission.

If by the treaty of peace between the United States and Spain an international commission had been provided for to determine the liability of Spain for the claims of our citizens, with an agreement by Spain to pay all claims allowed, and the claims now under adjudication had been presented, and declarations of our President and Secretary of State (1) that the claims were just, or (2) that Spain was liable for damages done by the insurgents, or (3) that concentration measures or other military acts were not legitimate acts of war, had been proved and the position assumed that these declarations must be made rules of decision which would preclude all defense to the claims, the absurdity of the pretension would have been clearly apparent.

Equally untenable are such propositions made to a domestic commission where the nation to which the claimants belong has released the defendant nation and agreed itself to adjudicate and settle the claims. The declarations of its officers made before such release and agreement—putting forth assertions of law or fact—are no more binding upon the domestic commission than they would have been upon an international commission. If in the present case such declarations were not incontestable by Spain when she owed the claims they are not incontestable by the United States now that she has released the claims and agreed to pay those which by a free and untrammelled tribunal may be adjudged to have been just claims against Spain according to the principles of international law.

These views being correct, it is not surprising that no decisions by international tribunals or domestic commissions have been cited during the recent arguments, and that the attempt to show by authorities that declarations of fact and law made by the executive of a nation are conclusive, notwithstanding the truth and the real right of the matter may be otherwise, has been based solely upon the assumed adoption of such a principle for the guidance of the regular judicial tribunals of general jurisdiction in the country whose executive has made the declarations. Even if the principle existed for such guidance, yet neither international tribunals nor domestic tribunals directed to make decisions according to the principles of international law would be governed by the same principles. Yet it will be useful to ascertain whether there is any foundation for the assumption referred to.

Rose v. Himely (8 U. S., 240): The plaintiff, an American, in the United States circuit court for South Carolina, claimed part of the cargo of the American schooner *Sarah*, which, after trading with the rebels of San Domingo, had been seized in 1804 by a French privateer, carried into the Spanish port of Barracoa, Cuba, sold there under

authority of an agent of San Domingo, and a part of the cargo carried to Charleston, S. C., where the plaintiff claimed it, after which proceedings there was in San Domingo an adjudication condemning the vessel. The United States Supreme Court held that the seizure was unlawful and that the San Domingo court had no jurisdiction to condemn the vessel.

In *Gelston v. Hoyt* (16 U. S., 246), in 1818, the plaintiff sued the defendants, who were customs officers at the port of New York, in trespass for seizing his ship, the *American Eagle*. A plea in justification was that the President of the United States had directed the defendants to seize the ship because she was to be fitted out in the service of Petion's government in San Domingo against Christophe's government in San Domingo. The United States Supreme Court (by Story, J.) held that the plea was bad because it did not aver that the governments of Petion and Christophe were foreign states duly recognized by the United States, or by France, of which nation San Domingo had been a dependency.

In *United States v. Palmer* (16 U. S., 310), in 1818, Palmer and others were indicted in the United States circuit court of Massachusetts for piratically seizing on the high seas property on a Spanish ship named the *Industria Raffaelli*. The case came to the Supreme Court upon a division of opinion among the justices of the circuit court, and the Supreme Court (by Marshall, C. J.) remanded the case, stating the principle that a civil war in a foreign nation should be viewed by United States courts in accordance with the view of the legislative and executive departments of the United States; that if these remain neutral, but recognize the existence of civil war, the courts should not consider the war acts of the rebels as criminal.

In the *Divina Pastora* (17 U. S., 52), the ship had been seized, in 1819, by a privateer flying the flag of the United Provinces of the Rio de la Plata and brought through stress of weather into New Bedford. The Spanish consul asked her release because the capture was made by a revolting dependency of Spain, and restitution was ordered by the United States circuit court in Massachusetts. The Supreme Court (by Marshall, C. J.), in accordance with the action of the court in the Palmer case, remanded the case to the circuit court, apparently assuming that the United States had recognized the existence of civil war between Spain and her colonies, but remaining neutral, so that the capture might perhaps on all the facts be lawful.

In the case of the *Estrella* (17 U. S., 298) the Spanish ship had been captured, in 1819, under authority of Venezuela, and it appearing that the capturing vessel, named the *Constitution*, had violated our neutrality laws by augmenting her force in New Orleans, the *Estrella* was restored to her Spanish owner by the district court of Louisiana, and the Supreme Court affirmed the decree.

In *Foster v. Neilson* (27 U. S., 253), in 1829 the plaintiffs claimed land in Feliciana, 30 miles east of the Mississippi River, under a grant from the Spanish Government on January 4, 1804, but the defendant, a resident of Feliciana, being in possession, refused to give up the same, claiming that Feliciana as a part of Louisiana had been ceded on October 1, 1800, by Spain to France, and on April 30, 1803, by France to the United States. On October 21, 1803, Congress passed an act to enable the President to take possession of Louisiana, and from that time forward by repeated acts of legislation treated the territory which embraced Feliciana as a part of Louisiana. The court decided against the plaintiffs, in order to "abide by the measures adopted by its own Government."

In the *Cherokee Nation v. Georgia* (30 U. S., 1), the Cherokee Nation, in 1830, by original bill in the Supreme Court, sought to enjoin the State of Georgia from executing certain laws of that State tending to destroy the Cherokee Nation and to seize its lands for the use of Georgia. The court (by Marshall, C. J.) held that it had no original jurisdiction of the controversy, and that if it had, while it might decide the question of title to the lands, it would not undertake to control the legislature of Georgia and restrain the exercise of its physical force, that savoring too much of the exercise of political power.

In *Williams v. The Suffolk Insurance Company* (3 Sumner, 270; 38 U. S., 415), the insurance company in 1839 sought to avoid the payment of a marine loss because the schooner *Harriet* went to the Falkland Islands and was seized and condemned by Buenos Ayres for being engaged in the seal trade at those islands contrary to the laws of Buenos Ayres. The court held that the master of the schooner did not make void the policy by going to the Falkland Islands; that as the American Government had insisted, through its regular executive authority, that the Falkland Islands did not constitute any part of the dominions within the sovereignty of the Government of Buenos Ayres, and that the seal fishing at those islands was a trade free and lawful to the citizens of the United States and beyond the competency of the Buenos Ayres Government to regulate, prohibit, or punish, the court would not go beyond this decision and reverse it so as to make void the insurance policies.

Luther v. Borden (48 U. S., 1): Luther, a citizen of Massachusetts, in 1842 brought an action in the United States court for the district of Rhode Island for breaking and entering his house, and the defense was that the plaintiff had been aiding an insurrection against the State government of Rhode Island, and that the defendants as a part of the militia of the State, acting under military orders, were endeavoring to arrest the plaintiff; and the question was whether it was the lawful government of the State from which such orders proceeded. There were two opposing governments, the old charter government which

the defendant supported, and a new government which the plaintiff was accused of aiding. The question as to the validity of the new government had been tried before the supreme court of Rhode Island, which decided that such government had never come into lawful existence, and the Supreme Court of the United States in 1849 refused to go beyond this decision and reconsider and redecide the question.

Kennett v. Chambers (55 U. S., 38): This was a bill in equity filed in Texas about the year 1852 to enforce the specific performance of an agreement made in Ohio in 1836 by Chambers to convey certain land in Texas for \$12,500, for which he had received the notes of the plaintiff, which had been paid. It appeared that Chambers was a general in the Texan army, engaged in raising troops to assist Texas to carry on hostilities against Mexico, and that one of the objects of the plaintiff in advancing the money and buying the land was to aid Chambers in his military expedition. Texas had been a part of Mexico and was not recognized by the United States as independent until March, 1837. The Supreme Court (by Taney, Chief Justice, Justices Daniel and Grier dissenting) held that the contract was illegal and void, and that the court would not recognize Texas as independent before the Government of the United States had so recognized it, in order to justify a contract made on our soil to aid in carrying on war against Mexico, with which the United States was at peace.

In the *United States v. Baker* (5 Blatch., 6), it appears that in June 26, 1861, Baker and others were indicted under the act of Congress of May 15, 1820 (3 Stats., 600), for robbery, constituting piracy, upon the high seas as members of the ship's company of the Confederate privateer *Savannah*, which captured the American brig *Joseph*. Nelson, J., charged the jury that there was no evidence of a state of war justifying the acts of the defendants, the Confederate government not having been recognized by the political departments of the Government. The jury disagreed and were discharged.

In the *Prize cases* (2 Sprague, 123; 67 U. S., 635), in 1862, the *Amy Warwick* and other vessels and their cargoes were condemned as lawful prize because of violations of the President's proclamation in April, 1861, setting up the blockade of the southern ports, although the seizures were made prior to the war legislation of Congress of July 13 and 29, 1861, the proclamation of blockade being held to be of itself conclusive evidence that a state of war existed justifying condemnation. Decision by Grier, Justice, while Justices Taney, Nelson, Catron and Clifford dissented.

Phillips v. Payne (92 U. S., 130): The part of the District of Columbia which came from Virginia being retroceded to that State in 1847, a person therein taxed by Virginia in 1875 brought a suit against the tax collector on the ground that the retrocession was unconstitutional and therefore void and the taxation of his real estate illegal. The

court held that Virginia having held the territory for more than a quarter of a century under an act of Congress, and her title having been recognized repeatedly by subsequent acts, a defacto government had come into existence whose validity the court would not disturb, in order to relieve the citizen from paying taxes upon his property. Why the court did not choose to decide that the retrocession by the formal and unqualified acts of both Virginia and the United States was constitutional is a mystery.

The *Ambrose Light* (25 Fed. Rep., 408; U. S. district court, southern New York, in 1885). Decision by Addison Brown, J.: A vessel commissioned by Colombian rebels was seized and libeled in New York as piratical, and the seizure was sustained. But it also appeared that after the seizure, on the same day, the United States Secretary of State wrote a letter to the Colombian minister refusing to recognize Colombia's closure of certain ports as effective. This was held to be an implied recognition of the rebels and of such a state of war as would prevent any condemnation of the vessel as piratical, and she was released on payment of costs. The long and learned opinion of Mr. Justice Brown, showing that otherwise the vessel would have been deemed a pirate, was only pertinent to show probable cause of seizure inasmuch as he restored the vessel to her owners on account of such recognition.

Jones v. United States (137 U. S., 202): Henry Jones was tried and convicted in 1890 in Maryland for murdering Thomas N. Foster in Navassa Island, a place alleged to be under the jurisdiction of the United States, but out of the jurisdiction of any particular State or district of the United States, and the question was whether this allegation was correct, so that Jones, for the crime committed on the island, could be tried in Maryland under sections 730 and 5339 of the Revised Statutes. It appearing that the President, in accordance with sections 5570-5578 of the Revised Statutes, had decided that the island belonged to the United States, and that by authority of the President it had been taken possession of and occupied as a newly discovered guano island by citizens of the United States, the court held that the island must be considered as belonging to the United States, but outside of any State or Territory, and that there was no error in the trial and conviction of the defendant.

The *Three Friends* (166 U. S., 1): This steamer, belonging to the Cuban revolutionists, was libelled in Florida in 1896 on account of an alleged violation of our neutrality obligations toward Spain, during the recent insurrection in Cuba, and the court (by Fuller, C. J.) held that the Cuban insurgents, on account of such recognition as the United States had given them, were a people within the meaning of the Revised Statutes (secs. 5281-5291) prohibiting citizens of the United States from assisting "any foreign prince or state or any col-

ony, district, or people" to commit hostilities against "any foreign prince or state, or any colony, district, or people with whom the United States are at peace."

The rule, however, has not worked both ways, for although the Cuban insurgents of 1896 were so far a people that our neutrality laws prevented them from fitting out gunboats in our ports to cruise against Spain, they were not in 1869 so far a people that Spain could not fit out gunboats in our ports to cruise against them. On December 16, 1869, Attorney-General Hoar decided that there should be no proceedings against Spanish gunboats which were being fitted out and armed in New York to commit hostilities against the insurgents in Cuba, which had not been recognized as a people by the United States. (13 Op., 177.)

In *Neely v. Henkel* (180 U. S., 109), under the law of Congress of June 6, 1900, providing for the punishment of crimes committed in any foreign country or territory occupied by or under the control of the United States, Neely was arrested in New York City for extradition to Cuba to be tried for embezzlement there committed. On habeas corpus proceedings his release was denied on the ground that Cuba was foreign country or territory within the meaning of the above act, and that the executive government of the United States had not proclaimed that the occupancy and control thereof had ceased.

A careful study of the full reports of the above cases thus briefly summarized will plainly show that neither the effective judgments given, nor the language used in assigning the reasons therefor when properly limited to the points which it was necessary to decide, give any countenance to the proposition that even in the courts of this country possessing general jurisdiction the mere declaration by the President or a member of his cabinet of an opinion of his upon a question of law and of fact is so conclusive that the courts will consider themselves bound by the declaration to inquire no further into the very truth and right of the matter.

The decisions and reasons of such regular tribunals relative to the effect to be given by them to the previous action of the Government as distinguished from mere assertions of officers of the executive branch apparently stand on a sound basis.

Many acts done and decisions made by an Executive when acting or speaking within the sphere of his constitutional duty may well be adjudged to have conclusive effect.

That rule of evidence may be resorted to in controversies with governments by which declarations against the interest of the party making them may be proved against him, and also declarations in his favor when made to the other party, or when they so accompany, explain, or give character to an act as to become a part thereof.

The recognition by the head of a government, whether formal or informal, of the independence of a new nation or of the belligerency of revolutionists is wisely treated as an act of significance and importance. So is an assertion of sovereignty by the executive of a government—necessarily so when accompanied by possession taken of the territory claimed. A failure of an executive to recognize belligerency or assert sovereignty may perhaps properly be considered as an act. This commission has so treated President McKinley's announced refusal to recognize the belligerency of the Cuban insurgents, and in accordance with international principles has decided that by reason of such refusal no absolute barrier can be set up against a recovery by our citizens of compensation for damages done by the insurgents.

We do this against the overwhelming vote of the two Houses of Congress in 1896 recognizing and declaring Cuban belligerency and independence and a state of public war between Spain and Cuba, which resolution, if it had been in the form of a joint resolution, and had been vetoed by the President, would have passed by more than a two-thirds majority and would have become a law. (Note 17.) But, because we do this, to claim that we are bound by erroneous assertions of law and fact made by the President in his numerous messages to Congress is an urging of subserviency further than this Commission is willing to go.

Although such of the foregoing decisions of the regular tribunals of the country, including the Supreme Court, as refuse to review the action of the executive department of the Government seem justifiable, it is equally clear that it would not have been the duty of an international tribunal, or even of a domestic tribunal administering international law, to make the same refusals, if the very same questions had been pursuant to an agreement between nations referred to such a tribunal for settlement, with the command to make decisions according to the principles of international law.

Before such tribunals the acts and declarations concerning the subject in dispute of any one of the governments, or of either the executive or legislative branch thereof, would be carefully considered and great weight given thereto. But they would not be considered as conclusive upon questions of fact and of international law, for that would be a refusal to make the investigations and decisions, to make which was the object for which the tribunals were created. It is because this is so that the counsel for the claimants have not been able to cite a single precedent for their present claims arising from the proceedings of an international tribunal, or a domestic tribunal administering international law. The whole reason for the existence of such tribunals is that they may review and pass upon the rightfulness and wrongfulness, according to the widest possible principles, of the assertions and acts of the nations whose conduct is called in question.

Similarly, it is to be noted that there is no such principle of enforced conformity to the declarations, or even the acts, of the executive of a government which finds any place in the prize courts of any country. From the very nature of those courts, such a principle could not exist. Prize courts are the domestic tribunals of a nation, created to determine the rights of property-owners of every nationality against the sovereign of the nation. The sovereign captures a vessel and asks its condemnation in his own courts—necessarily the decision is to be based not upon the assertions or acts of the sovereign, but upon the principles of international law applied to the facts taken notice of or proved—as from this Commission the United States asks a decision whether its citizens had claims against Spain which were just according to the principles of international law, whatever were the assertions or acts of the Government of the United States in connection with the facts upon which the claims were based.

A modern American author of deserved distinction felicitously describes the character of prize courts as international tribunals, saying:

The only maritime court with which international law is directly concerned is the prize court, a municipal tribunal set up by belligerent states for the purpose of passing upon the validity of captures made by their cruisers. While so engaged the prize court is not supposed to administer the law of the state to which it belongs, but the generally accepted law of nations, which has no locality. * * * The decrees of prize courts have thus become acknowledged sources of international law, the greater or less weight to be given to any particular deliverance depending in each case upon the learning, impartiality, and independence of the tribunal from which it emanates. And as such courts are the outcome of maritime usages that represent the very earliest agreement of civilized nations as to mutual rights and interests, antedating by centuries any general understanding as to the principles that should regulate intercourse on land, their decisions may be justly regarded as the earliest sources of international law, or, as Austin has expressed it, the places where its rules are first found. (Taylor's International Public Law, pp. 42-43, sec. 32.)

The duties of prize courts, as they now exist, are the same as those announced on June 11, 1799, by Sir William Scott [Lord Stowell] in giving judgment of condemnation in the case of the *Maria* (1 C. Robinson, 350), when he said:

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me, namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent States, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he

would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals.

Attorney-General James Speed in the case of the *Adelso* on April 2, 1866 (11 Opinions, 449) in which he said the President could not remit a condemnation in prize, aptly states what prize courts are, as follows:

Prize courts are tribunals of the law of nations and the jurisprudence they administer is a part of that law.

In the case of the *Paquete Habana* (175 U. S., 677), the question was whether Spanish fishing smacks captured on the coast of Cuba during the late war with Spain were good prize of war, and a majority of the court (by Mr. Justice Gray) held that they were not (Chief Justice Fuller and Justices Harlan and McKenna dissenting). Mr. Justice Gray uses language as follows:

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

The decision that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, can not be condemned by a prize court, *even by direction of the Executive, without express authority from Congress*, appears to us to repel any inference that coast fishing vessels, which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated, must be condemned by a prize court for want of a distinct exemption in a treaty or other public act of the Government. (Note 18.)

Learned and able counsel for claimants, in a supplementary brief of February 7, 1903, in resisting the contention of the special counsel for the Government that this Commission must pass upon the legality of General Weyler's concentration policy independently and without being controlled by the attitude of our Government on that question, criticize the special counsel for basing his argument upon the language of Lord Stowell (Sir William Scott) in the prize case of the *Maria* in 1799, because Lord Stowell later, in 1811, enforced in prize cases the British orders in council, and the learned counsel proceed to argue that in accordance with Lord Stowell's action "no court like that of Lord Stowell can violate the instructions of its sovereign," and that therefore this Commission can not "render a decision involving the validity of a declared policy of this Government toward the Cuban insurrection."

The learned counsel, in their carefully prepared argument on this point, fail to mention the grounds upon which Lord Stowell rested his conclusion to enforce the orders in council, namely that *the King in council had legislative power over the prize courts*. The difference, then, between Lord Stowell's court and this is fundamental. Legislation

had directed Lord Stowell what to do in the case of captures of a certain kind. Congress has given no directions to this Commission what to do in any case or class of cases. Lord Stowell's language is plain:

By the constitution of this country the King in council possesses legislative rights over this court and has power to issue orders and instructions which it is bound to obey and enforce, and these constitute the written law of this court. * * *

The constitution of this court, relatively to the legislative power of the King in council, is analogous to that of the courts of common law relatively to that of the Parliament of this Kingdom.

If President McKinley's statements in his message had the same operative force as a law of the English Parliament or as an act of Congress, the argument of the citation of the learned counsel would be pertinent; as the case is, the argument is the other way.

It is true that Lord Stowell was constrained to make an effort in 1811 to narrow the broad doctrine he so generously expounded in 1799. It would have been wiser for him to have rested his decision to enforce the orders in council wholly upon his proposition that they were justifiable according to international law because retaliatory merely. His mistake is clearly pointed out in an article in the *Edinburgh Review*, and the powers and duties of prize judges at the present time are in full accord with his liberal views in 1799. (Note 19.)

In *American Law Review*, vol. 5, 255, for January, 1871, in an article on "Contraband of war," the writer says:

In prize tribunals the supreme law will always be the provisions of any treaty which may be in force between the government of the captor and that of the claimant. In default of such treaty the common international law will be invoked. In determining and applying this, publicists of every nation are citable; authorities and decisions in the prize courts of all nations recognizing the supremacy of international law are precedents. Whether or not orders or proclamations by the executive government of the belligerent captor should be recognized as binding upon the courts ought not to be considered a question open to doubt. Obviously if such orders or proclamations take the form of an interference by the executive with the functions of the judiciary department, such an interference is as unjustifiable in causes of an international character as in causes of a strictly private nature.

It will be urged that this is not a fair way to state the case; that there is no pretense that the government can interfere with the law, but that the true question is whether or not the government can not *make* the law for its own courts; whether orders or proclamations are not to be ranked with statutes in affairs of a national and diplomatic character. It may be that there is possible room for argument. Yet a decision in favor of the residence of such power in the executive arm would be the pregnant seed of great evil. It is impossible for any government to *make* international law. At most it can only affect, in a greater or less degree, the administration of that law by its own courts. Even this is a delicate matter. Where a parliament or a congress passes municipal laws which are designated to operate within the sphere of international law, it is trenching upon very perilous grounds. * * * The instant that a court sitting to administer international law recognizes either governmental orders or proclamations setting forth governmental policy as constituting rules of that code, at once that court ceases in fact to administer in its purity that law which it pretends to administer.

It acts upon bastardized principles. It loses its prestige and authority abroad. The belligerent, which would have respected its decrees if uttered upon the basis of unadulterated international law, will repudiate them when they are uttered upon the basis of an unjustifiable intermixture of that law and of municipal regulations. The function of the tribunal has undergone a change which is justly and inevitably fatal to its weight and influence with foreign powers. It is not only a degradation of the court itself, but it is a mischievous injury to the government which has destroyed the efficiency of an able ally. If the administration of international law by the court runs counter to the wishes and policy of the executive, the remedy should not be sought in the infusion of foreign and destructive elements into the court itself; but the executive should use the power which it possesses to annul the decree of the tribunal. It should seize and confiscate as an executive act, or set free as an executive act. It would thus preserve unimpaired for future use the fair character of the national judiciary.

The Commission therefore adheres to its conclusion that its duty is to decide upon the validity of claims according to its own views of the pertinent principles of international law and of the facts of which judicial notice is taken or proof is made. The adoption of a different rule substituting for law and fact the mere declarations and assertions of any officer of the Government should not be expected of even a temporary United States court.

THIRD PRINCIPAL DIFFERENCE — RECOGNIZED BELLIGERENCY, WAR BETWEEN NATIONS, INTERNATIONAL WAR, NOT NECESSARY TO RELIEVE A NATION PUTTING DOWN AN INSURRECTION FROM BEING AN ABSOLUTE GUARANTOR TO NEUTRAL FOREIGNERS AGAINST INJURIES.

The idea that "recognized belligerency," "war in an international sense," "war between nations" must exist, or else that a nation making war upon its insurgent subjects is an absolute guarantor to neutral foreigners of compensation for all damages which may be done by the insurgents or by its own troops was not accepted by the Commission.

On the contrary the Commission decided that where an armed insurrection has gone beyond control the nation is entitled to the well-recognized exemptions from liability for the acts of insurgents and for its own legitimate acts of war.

The idea of the claimants seemed to be that because the granting of recognition of the belligerency of insurgents by a foreign nation bars the claims of the citizens of that nation, therefore, when the foreign nation refuses recognition the parent government becomes the absolute guarantor of indemnity to the citizens of the refraining nation for damages done by the insurgents or the national forces. But this conclusion is plainly a non sequitur.

The Commission accepted the proposition that there was no barrier against claims of citizens of the United States erected through a recognition by their Government of the belligerency of the Cuban insurgents. The President did not make such recognition, but his refusal to do so

did not deprive Spain of the exemptions from liability which, according to international law, belong to a nation engaged in putting down by war an insurrection which has gone beyond control.

Neither did Spain deprive herself of her rights of exemption by failing to formally recognize the belligerency of the Cubans. A parent state never formally recognizes the insurgents as belligerents, although it may in fact treat them as such by carrying on war against them in accordance with the rules and usages of international warfare. The failure to give such formal recognition does not make the state liable for damages done by the insurgents to foreigners, unless the insurrection is controllable and due diligence is lacking.

A foreign state recognizes or refuses to recognize insurgents as belligerents according to its judgment or desire. If it recognizes belligerency, it may fairly be considered as asserting that the insurrection has passed beyond the control of the parent state and as agreeing to look only to the insurgents for unlawful damages by them inflicted, and may thus be debarred from urging the claims of its citizens against that state for damages done by the insurgents.

If it refuses to recognize belligerency, no obligation is thereby created and imposed upon the parent state to make good to the citizens of the nation refusing recognition damages done to such citizens by the insurgents, where, notwithstanding due diligence was exerted by the parent state, the insurrection passed beyond its control.

When nations view insurrections in other states and decide whether to recognize or refuse to recognize the insurgents as belligerents they may be influenced by various considerations. A national desire to aid the insurgents to secure their independence may lead to recognition, aversion to such independence may cause nonrecognition. A nation may deem it the wisest course to ignore the existence of an insurrection in another country and have no dealings with the insurgents, or it may consider it the best policy to recognize the insurgents as belligerents and have such dealings with them as international law permits.

In case of recognition the state giving it enforces its neutrality laws as between the belligerents and suppresses hostile expeditions from its own territory or waters, but it persists in maintaining the right of commercial intercourse and trade with the insurgents and does not treat their hostilities against the parent state as piracy or crimes of any sort. If its merchant vessels are searched or seized by warships of the insurgents such vessels must make no resistance, but must await the decision of the prize courts of the insurgents. All the rules and regulations of international warfare as against both the parent state and the insurgents become operative, and may be appealed to by the foreign state against the belligerents, and by the insurgents against the foreign state, in various exigencies that may arise. Considerations of this character generally determine the question of recognition or

nonrecognition; and seldom is the decision of a nation affected by considerations concerning the enforcement or relinquishment of possible claims of citizens of the nation against the parent state for damages done to their persons or property by the insurgents.

At all events the nonrecognition of the belligerency of insurgents does not make the parent government the guarantor of absolute indemnity under all circumstances to citizens of the refraining nation, nor deprive that government of the ordinary exemptions from liability for damages done to foreigners during an insurrection which has gone beyond control. The true condition is well expressed by Commissioner Wadsworth in the Salvador Prats case (Moore, 2888), as follows:

So, also, we dissent from the view taken of the consequences of the refusal by Mexico to recognize the rebel enemies of the United States as a belligerent power and placing it thereby on an equality of belligerent rights with the parent Government inside the jurisdiction of Mexico. Such refusal did not deprive the United States of the exercise of any right of war or any immunity resulting from a state of war, but merely refused, in a spirit friendly to the United States, to extend those rights to the insurgents. Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that government to aliens did not result from the recognition of the belligerency of the rebel enemy by the strangers' sovereign.^a It resulted from the *fact* of belligerency itself, and whether recognized or not by other governments. But the proclaimed recognition of the fact by a government is conclusive evidence of the fact, and, so to speak, an *estoppel* as to that government. * * * So far, therefore, as the responsibility of the United States to Mexico in this case is concerned, it is in nowise increased or diminished by the failure of the latter to accord belligerent rights to the Confederates.

The proposition rejected by the Commission was argued at great length and with much persistency in every form of statement calculated to show that the only way in which a nation can avoid responsibility as an absolute guarantor of indemnity to neutral foreigners for damages received from its insurgent subjects is by such a recognition of their belligerency as will create war in an international sense. But, in whatever form it is put, this proposition does not seem to be sustained by controlling authority. The position of the United States with reference to the great rebellion stood in the way of such a doctrine. It was therefore asserted that the United States recognized the Southern Confederacy in a manner different from the recognition of the Cuban insurgents by Spain. This alleged difference was elaborated at great length, the attempt being based largely upon the fact that the United States declared a blockade against the Southern ports under the law of nations, while Spain set on foot no blockade of Cuban ports. This may be accounted for by the fact that the Cubans had in possession no harbors to be blockaded, while the Confederacy had many. There seems to be no vital or essential difference, so far as pending questions

^aNot meaning that there had been such recognition—because there had been none—but meaning that it was not necessary that there should be such recognition by Mexico in order to exempt the United States.

are concerned, between the recognitions by the two countries of insurrections which had gone beyond control and were to be put down by military forces used in actual war. Neither Government during the war formally recognized its insurgents, and the Southern Confederacy was never recognized at all, and disappeared, leaving only a history of stupendous failure, while Cuba at last secured recognition, her war for independence was brilliantly successful, and she became a new republic among the nations of the earth. But, while making war to prevent this consummation, Spain, as matter of international law fairly applied, was entitled to the same powers of action and privileges of exemption from liability which the United States possessed in 1861 in dealing with insurrection in the South or now possesses in dealing with insurrection in the Far East.

FOURTH PRINCIPAL DIFFERENCE—TREATY OF 1795.

The dissenting Commissioners hold that the treaty of 1795 imposed duties upon Spain much more onerous than any prescribed by the rules of international law, and renders Spain liable for all damages to the persons and property of our citizens under all circumstances, even for damages done in the track of war by legitimate war movements necessary for the suppression of the insurrection. The opposite proposition of the Commission, No. 11, has been already considered in the early part of this opinion.

FIFTH PRINCIPAL DIFFERENCE—BURDEN OF PROOF IS NOT UPON THE UNITED STATES.

It having been seriously insisted that as a rule of procedure Spain and therefore the United States is *prima facie* liable for all damages done by the Cuban insurgents, and that in every case where the claimant has proved his United States citizenship and the fact of damage, the burden is upon the United States to show that Spain used due diligence to prevent the same, and that the burden of proof is in like manner, in every case, upon the United States to show that any damages done by Spanish troops were the result of legitimate acts of war, the Commission rejected this notion, and ruled that in order before this Commission to charge Spain and consequently the United States for damages done by Cuban insurgents and by Spanish troops it would be necessary for each claimant to aver and prove the facts showing that the Spanish authorities did not use due diligence to repress the insurgents and that the acts of the Spanish troops were wanton and unnecessary destruction of neutral property.

It is quite true that in some legal trials in ordinary forums, where certain facts, if they exist, are peculiarly within the knowledge of one party, an unfavorable presumption may be raised against him upon a

point material to the case, which will throw upon him the burden of proving the facts which will sustain his contention, as, for instance: Where a person is charged with doing an act which is unlawful unless a license therefor has been duly granted, it may be sufficient to aver that the party had no license, without proving its nonexistence, but imposing upon the party the burden of proving that he has a license, if such be the fact. The same burden of proof is sometimes imposed where the property damaged or destroyed was exclusively in the possession or under the management of the defendant, as in most cases of bailment, or where persons were injured by common carriers and it is assumed on the trial that the defendant was negligent unless he shows that he was not.

But we have heard of no case where a sovereign nation pursued by a private claimant, before an international or domestic commission, has had any such technical rule applied upon the hearing. Counsel for such a claimant who should rise before such a commission and say, "Having proved our citizenship and the damages done to our property on the soil of the defendant nation we now rest our case, contending that the burden of proof is upon that nation to show that she is not liable to pay the damages," would most surely be told to proceed and prove all the facts necessary to show such neglect of duty or violation of right upon the part of the defendant nation as would create a liability to make compensation.

The idea of such a rule of evidence in international tribunals or in domestic commissions administering international law does not seem to have been heard of until presented to the present Commission and accepted by Commissioner Chambers. The authorities in its behalf do not sufficiently sustain it. The main citation is the statement of Hall (*Int. Law*, 226), where he says:

Prima facie a State is of course responsible for all acts or omissions taking place within its territory by which another State or the subjects of the latter are injuriously affected. To escape responsibility it must be able to show that its failure to prevent the commission of the acts in question if not intended to be injurious, or its omission to do acts incumbent upon it have been within the reasonable limits of error in practical matters, or if the acts or omissions have been intended to be injurious, that they could not have been prevented by a watchfulness proportioned to the apparent nature of the circumstances or by means at the disposal of a community well ordered to an average extent; or else it must be able to show that the injury resulting from the acts or omissions has been either accidental or independent of any act done within the territory which could have been prevented as being injurious.

Hall also says (*Int. Law*, p. 56):

Foreign nations have a right to take acts done upon the territory of a State as being *prima facie* in consonance with its will, since where uncontrolled power of effective willing exists, it must be assumed, in the absence of proof to the contrary, that all acts accomplished within the range of the operation of the will are either done or permitted by it.

Phillimore says (vol. 3, p. 218, 2d ed.):

A State is *prima facie* responsible for whatever is done within its jurisdiction, for it must be presumed to be capable of preventing or punishing offenses committed in its boundaries.

A careful examination of the full expositions made by Hall and Phillimore which contain the above extracts shows that they had reference to injuries and losses happening during peace and while the country was in a reasonably well-ordered condition, and can not be construed as applicable as a rule of evidence or of responsibility after an insurrection has broken out, war has become flagrant, and the conflict has gone beyond the control of the Government.

It may well be suggested that if any such rule of evidence as is now urged for adoption by the Commission could be applied against Spain before an international tribunal, it might not be justly or equitably now applied to the United States. Facts may be peculiarly within the knowledge of Spain, but not known to the United States, and not obtainable by our Government, which may try in vain to secure assistance from Spain in making defenses to claims. Equitably a harsh presumption might not be applied by a court to a guarantor which might well be enforced against the principal if he were in court.

SIXTH PRINCIPAL DIFFERENCE: NO SEVERE NEW AMERICAN RULE OF LIABILITY TO BE INVENTED BY THE COMMISSION.

The Commission has felt obliged to resist all suggestions that the principles of international law, as they can be deduced from the consensus of the nations, should be warped or strained or changed by construction in order to establish an extremely rigid rule of responsibility of nations to neutral foreigners for acts done by mobs or insurgents, or done by the troops of the nation in suppressing mobs or insurgents.

Messrs. Page and Conant, in their brief of April 17, 1902 (p. 75), mistakenly assuming that the proposition that for damages done during the insurrection Spain may be relieved, on the ground that this insurrection was a *de facto* state of war, is a new and American rule, say:

* * * This new rule will be a danger and a menace to every American citizen residing in a foreign territory in times of riot and insurrection. Such a doctrine affords an easy excuse for the neglect of foreign authorities to protect American citizens doing business within their domain, and will be raised by disorderly Asiatic or South American countries in every period of internal commotion or insurrection. * * * The same thing can be done in innumerable cases of internal disorder, and the damage done to American citizens in any petty revolutionary struggle in South America, or in conflicts like the Boxer riots in China or religious riots in Turkey, will be excused. * * * There could not be conceived a doctrine more dangerous to the interests of the United States as an expanding colonial and commercial power, whose citizens are liable to be exposed to danger, both as to their persons and property, in all quarters of the globe.

It would be unbecoming indeed if this Commission, as a judicial tribunal of the United States, were to be influenced by such considerations as the above. Even if it were allowable to be so influenced, it is not clear where our real national interests would lead us. It is true that as a great and powerful nation we are not likely often to have mobs too formidable for prompt extinction, or soon, if ever again, to contend with the armies of a rebellion, while we are reasonably certain, as an enterprising and adventurous people, to be called upon from time to time to intervene to obtain protection or redress for our citizens temporarily sojourning or owning property in other countries. It is more than probable that we shall have many such complaints to make against the smaller republics of the Western Hemisphere. These might lead us to desire to find the true rule of responsibility to be a hard and severe one.

But on the other hand comes the thought that we are sure, through worthy sentiment and an enlightened self-interest, frequently to render our friendly counsel and assistance to those republics against attempts of nations of overwhelming power to force the payment of claims not founded upon true principles of international law. If such considerations were to engage our attention it would most probably be seen when speculating upon the future that our desires in the prosecution of claims and our desires in the defense of claims are likely to be so evenly balanced as to lead us to wish to recognize a rule of liability, being a principle of international law, which will be fair and just for all mankind, according to the enlightened opinion of the whole family of civilized nations, both large and small. At all events, to find in existence, if we can, such an international principle, is our plain duty; not to invent and promulgate a new American rule of any kind. If we were to make such an invention and so apply the rule as to cause the allowance of claims which would not otherwise be paid, we should lose labor and waste money for our pains; because, while in future controversies the new rule would be always admitted by other nations when it would work against the United States, it would, whenever it was appealed to in our favor, be resisted on the just ground that not the proclamation of one nation, but the consensus of all or most of the nations, makes international law. An unbiased ascertainment and an impartial application of the true principle of international law is the pathway of national wisdom and national honor.

CONGRESS HAS FULL POWER OVER INDEMNITIES COLLECTED FROM
FOREIGN NATIONS.

The foregoing principal differences between the Commission and the counsel for the claimants mainly grow out of vital and irreconcilable antagonisms as to the meaning and force of the words of the act of Congress to which the Commission owes its existence, which words all agree should be controlling.

The complete power of Congress over indemnities collected from a foreign nation is not disputed but is affirmed by the Commission. Congress may decide to keep and use the property acquired, whether territory or money, and make no distributions to any sufferers from the causes which resulted in the acquisition; or it may make distributions of the whole or a part of the indemnities received. It may make such distributions by act of Congress directly to individuals named or ascertained by the Executive, or by a domestic commission having no judicial powers whatever. Or Congress may create a judicial tribunal and prescribe the rules to guide its decisions, which rules the court will be bound to accept and apply.

Congress might have done, or may at any time do, anyone of the extraordinary things which this Commission is asked by the claimants to do, but declines to do: (1) Order the payment of all claims which were presented by the claimants to our Government, and by our Government to Spain, and were relinquished by the treaty; (2) order the allowance of damages in all cases of injuries done to our citizens by the insurgents or of damages done by the Spanish troops; or Congress might even have directed this Commission, as a court, to do its work in accordance with certain rules of adjudication prescribed by the law: (1) To apply a presumption of liability which would impose upon the Attorney-General in each case the burden of showing nonliability; (2) to ascertain the principles of international law by the declarations made by the executive officers of the United States Government in the contentions with Spain which led up to the war; (3) to accept as competent and conclusive proof of facts all statements at any time made by the executive Government of the United States; (4) to treat the refusal of the Executive of the United States to recognize the insurgents as belligerents as imposing an absolute obligation upon Spain to pay all damages done by the insurgents or her own troops under any circumstances; (5) to declare concentration to be an illegitimate act of war, and allow all damages caused thereby or of which concentration was an incident; (6) to consider the treaty of 1795 as applying to real and personal property in Cuba, and as imposing an absolute guaranty by Spain that her officials would do no injury to such property even when found in the track of war or when military movements required its injury, destruction, or appropriation; all these things to be done without the slightest reference to the obligations existing at the date of the treaty of 1898, according to the principles of international law, on the part of the Government of Spain in favor of citizens of the United States.

Congress, however, has not yet done any one of these things, but has only fulfilled the exact measure of its duty to our own citizens and of our promise to Spain; created a judicial tribunal to adjudicate the claims of our citizens against Spain and to allow such as were then

due from that Government to those citizens according to the principles of international law—to allow the good claims and to reject the bad, whatever had been the previous history of all or any of the claims.

HOW CONGRESS DISTRIBUTED THE ALABAMA CLAIMS MONEYS.

The views here stated are exemplified by the action of the United States with reference to the disposition of the Alabama moneys—\$15,500,000 received from Great Britain under the award of the Geneva arbitrators as indemnity for violations of the international law of neutrality as its rules were specifically recited in the agreement to refer to arbitration in the treaty of Washington of May 8, 1871. The amount awarded was based entirely upon an estimate of the losses by United States citizens through the capture and destruction of their ships and cargoes by cruisers of the Southern Confederacy fitted out in English shipyards or refitted in English harbors; but the United States insisted that the award should be made to the National Government with its right to the free and unrestrained disposition thereof. The arbitrators had decided as to certain cruisers that Great Britain was “inculpatated” for the captures made by them; as to certain others that she was “exculpatated.”

Congress when considering the question of the disposition of the moneys found that a general reference of all the claims to a Commission to be adjudicated according to the principles of international law would give no judgments whatever to the persons suffering losses. They had no valid individual claims against Great Britain. Her neglect of the duties of neutrality, while it had resulted in losses to individual Americans, had created no individual claims in their favor against Great Britain. Moreover, they had no individual claims against the government which had actually destroyed their property—the Southern Confederacy, with naval vessels waging legitimate warfare on the high seas. Congress therefore by its act of June 23, 1874 (18 Stats., 245), created a tribunal and gave directions that certain claims should be allowed thereby, namely, claims of our citizens directly resulting from damages caused by the inculpatated cruisers—the *Alabama* and *Florida* with their tenders, and the *Shenandoah* after she left Melbourne. Under the adjudications thus made only \$9,316,000 of the \$15,500,000 was distributed, and later Congress by its act of June 5, 1882 (22 Stats., 98), created a second tribunal and gave directions that the balance, which had grown by the additions of gold premiums and interest to \$10,089,000, should be distributed to the losers by captures made by the exculpatated cruisers, who were given priority of payment; and to the shipowners who, during the war for the Union, had paid premiums for war insurance on vessels and their cargoes which came to no seizure or harm whatever.

The exculpated-cruisers claimants received payment in full—\$3,346,000. The war premium claimants received \$6,743,000 on their allowed claims of \$16,312,000. By decisions of counter commissions the United States was compelled to pay to British subjects \$2,000,000 for damages done to their property by the Union forces during the rebellion (treaty of May 8, 1871; award of September 25, 1873), and to pay England \$5,500,000 for some mysterious reason (doubtless because the British commissioner and the Belgian umpire thought the Geneva award should have been only \$10,000,000), which \$5,500,000 was awarded nominally for the assumed value of the participation by United States citizens in the inshore fisheries of the British provinces (Halifax Commission award of November 23, 1877). So that in the whole business the United States was a loser by direct payments from its Treasury of at least \$7,500,000.

Congress thus used its unquestionable powers and exercised its wide discretion to distribute according to its uncontrolled will the Geneva award moneys, without requiring any adjudication by the tribunal of distribution that there had existed any just individual rights of claimants against the Confederate government, against England, or against the United States. Congress might have pursued the same course with reference to the individual claimants for damages received during the Cuban insurrection and have ordered the absolute payment of the claims instead of providing that only those should be paid which were equitably and legally due according to the principles of international law. But such is not the written law.

ABILITY AND DILIGENCE OF COUNSEL FOR CLAIMANTS—DIFFERENCES IN THE COMMISSION.

High commendation is due to the eminent counsel for the claimants on account of the acumen and labor they have brought to the elucidation of the questions involving claims nominally amounting to \$60,000,000. Their briefs and published arguments will stand as monuments of their learning and powers of research and exposition; storehouses from which other counsel in future discussions of the great variety of questions raised will draw the most valuable material. It is through no omission or fault on the part of the counsel that thus far they have not broken down the simple and impregnable proposition that as the general rule a nation engaged in subduing an armed insurrection which has gone beyond its control is not liable to neutral foreigners for damages done by the insurgents or resulting from its own legitimate war movements. Their arguments have convinced two learned members of the Commission, notwithstanding the majority with much regret but without doubt or hesitation have differed for reasons they have stated and attempted to establish. No self-objurgations on account of this difference need be uttered by the members of

an inferior court like this, in view of the occasional entanglement of most learned and supreme tribunals in a labyrinth of contradictions from which a decision by a majority of one emerges only through measureless tribulation, the operative conclusion of which is both sustained and opposed by arguments, each of which in the absence of the other seems to the unfamiliar mind to be clear and conclusive. Yet, this must sometimes be the course of justice in enlightened commonwealths possessing a free and independent judiciary.

NOTES ACCOMPANYING THE OPINION OF COMMISSIONER CHANDLER.

NOTE 1.—CONCENTRATION AND DEVASTATION.

The right to remove the inhabitants of the regions where military operations are in progress is nowhere denied by authors or judges. As a measure preliminary to devastation, it is a humane act; and devastation of the most radical character is permitted when the army commanders deem it called for by the military exigency.

Devastation is to be tolerated which reduces an enemy in a short time to beg for peace. (Grotius, Book 3, ch. 12, sec. 1.)

Hall, in his *International Law*, at page 553-555, says:

Devastation is capable of being regarded independently as one of the permitted kinds of violence used in order to bring an enemy to terms, or as incidental to certain military operations, and permissible only for the purpose of carrying them out. Formerly it presented itself in the first of these aspects. Grotius held that "devastation is to be tolerated which reduces an enemy in a short time to beg for peace," and in the practice of his time it was constantly used independently of any immediate military advantage accruing from it. * * * In the eighteenth century the alliance of devastation with strategical objects became more close. It was either employed to deny the use of a tract of country to the enemy by rendering subsistence difficult * * * or it was an essential part of a military operation. * * * At the same time devastation was still theoretically regarded as an independent means of attack. Wolff declares it to be lawful both as a punishment and as lessening the strength of an enemy. Vattel not only allows a country to be "rendered uninhabitable, that it may serve as a barrier against forces which can not otherwise be arrested," but treats devastation as a proper mode of chastising a barbarous people; and Moser in like manner permits it both in order to "deprive an enemy of subsistence which a territory affords to him," and "to constrain him to make peace."

* * * Devastation is always permitted * * * in those cases in which destruction is a necessary concomitant of ordinary military action. (Sec. 186.)

The amount of destruction or of suffering which may be caused is immaterial if the result obtained is conceived to be proportionate. (Sec. 185.)

An authoritative and official expression of the American view of the right of devastation was made after Professor Lieber had been called upon by President Lincoln to draft "Instructions for the government

of the armies of the United States in the field" which resulted in General Order No. 100, Adjutant-General's Office, April 24, 1863, as follows:

Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army. * * *

War is not carried on by arms alone. It is lawful to starve the hostile belligerents, armed or unarmed, so that it leads to the speedier subjection of the enemy.

(See the above General Order No. 100 in Davis's International Law; Appendix, 401, and in 2 Halleck Int. Law, 40.)

The Hague convention (the one called the second convention), signed July 29, 1899, by delegates representing fifteen nations, including the United States, relates to the Laws and Customs of War on Land.

Captain Crozier, U. S. Army, in his special report of July 31, 1899, says:

The code in general presents that advance from the rules of General Order No. 100, in the direction of effort to spare the sufferings of the populations of invaded and occupied countries, to limit the acts of invaders to those required by military necessities, and to diminish what are ordinarily known as the evils of war, which might be expected from the progress of nearly forty years' thought upon the subject.

Article 23 is as follows:

Besides the prohibitions provided by special conventions, it is especially prohibited:

- (a) To employ poison or poisoned arms.
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army.
- (c) To kill or wound any enemy who, having laid down arms, or having no longer means of defense, has surrendered at discretion.
- (d) To declare that no quarter will be given.
- (e) To employ arms, projectiles, or material of a nature to cause superfluous injury.
- (f) To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva convention.
- (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

The following declaration is contained in the convention:

Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

The failure to include concentration among the prohibitions clearly shows that it was not deemed an inadmissible incident of legitimate warfare.

American concentration in the war for the Union, 1861-1865.

Gen. Thomas Ewing's order dated at Kansas City, Mo., August 25, 1863:

All persons living in Cass, Jackson, and Bates counties, Mo., and in that part of Vernon included in the district, except those living within one mile of the limits of Independence, Hickmans Mills, Pleasant Hill, and Harrisonville, and except those in that part of Kaw Township, Jackson County, north of Brush Creek and west of the Big Blue, embracing Kansas City and Westport, are hereby ordered to remove from their present places of residence within fifteen days from the date hereof.

American concentration order in the Philippines.

Gen. J. F. Bell's order dated at Batangas, December 8, 1901.

In order to put an end to enforced contributions, now levied by insurgents upon the inhabitants of sparsely settled and outlying barrios and districts by means of intimidation and assassination, commanding officers of all towns now existing in the provinces of Batangas and Laguna, including those at which no garrison is stationed at present, will immediately specify and establish plainly marked limits surrounding each town bounding a zone within which it may be practicable, with an average-sized garrison, to exercise efficient supervision over and furnish protection to inhabitants (who desire to be peaceful) against the depredations of armed insurgents. * * *

Commanding officers will also see that orders are at once given and distributed to all the inhabitants within the jurisdiction of towns over which they exercise supervision, informing them of the danger of remaining outside of these limits, and that unless they move by December 25, from outlying barrios and districts with all their movable food supplies, including rice, palay, chickens, live stock, etc., to within the limits of the zone established at their town or nearest town, their property (found outside of said zone at said date) will become liable to confiscation or destruction. * * *

J. F. BELL,
Brigadier-General, Commanding.

Cuban insurgents' proclamations of devastation.

GENERAL HEADQUARTERS OF THE ARMY OF LIBERATION,
Najasa, Camaguey, July 1, 1895.

To the planters and owners of cattle ranches:

* * * * *

The sugar plantations will stop their labors, and whosoever shall attempt to grind the crop notwithstanding this order will have their cane burned and their buildings demolished. The person who, disobeying this order, shall try to profit from the present situation of affairs, * * * will be considered an enemy, treated as a traitor, and tried as such in case of his capture.

MAXIMO GOMEZ,
The General in Chief.

DECREE—LIBERTY ARMY OF CUBA, OCTOBER 20, 1895.

The sugar plantations to suspend work, and those who attempt to make the crop after this order, their cane fields will be burned and their factories and machinery destroyed.

GENERAL HEADQUARTERS AT THE NUEVAS, *October 20, 1895.*

CARLOS ROLOFF.

ORDER NOVEMBER 2, 1895.

To the sugar manufacturers, cane planters (colonos), and proprietors of this zone under my command.

First. The buildings and cane fields of all plantations will be considered and respected provided no work is given to any able-bodied laborer, nor the operations of grinding commenced.

* * * * *

Fourth. Those who contravene this order will be severely punished and their buildings and cane fields reduced to ashes.

HEADQUARTERS OF OPERATIONS, *November 2, 1895.*

FRANCISCO J. PEREZ,
Chief of the Brigade.

GENERAL HEADQUARTERS OF THE ARMY OF LIBERATION,
Territory of Sancti Spiritus, November 6, 1895.

* * * * *

ARTICLE 1. That all plantations shall be totally destroyed, their cane and out-buildings burned, and railroad connections destroyed.

ART. 2. All laborers who shall aid the sugar factories * * * shall be considered as traitors to their country.

ART. 3. All who are caught in the act, or whose violation of article 2 shall be proven, shall be shot. Let all chiefs of the army of liberation comply with this order, determined to unfurl triumphantly, even over ruin and ashes, the flag of the republic of Cuba.

M. GOMEZ, *General in Chief.*

HEADQUARTERS OF THE ARMY OF LIBERATION,
Sancti Spiritus, November 11, 1895.

To honest men, victims of the torch:

The painful measure made necessary by the revolution of redemption * * * will plunge you in misery. * * * There remains no other solution but to triumph, it matters not what means are employed to accomplish it.

* * * * *

MAXIMO GOMEZ, *General in Chief.*

PROCLAMATION, NOVEMBER 27, 1895.

General Gomez, on November 27, 1895, issued a proclamation as follows:

"ARTICLE 1. All sugar plantations will be totally destroyed, the standing cane set fire to, their factory, buildings, and railroads destroyed.

"ART. 2. Any mechanic who, by the strength of his arm, undertakes to help to run those factories, the springs of the resources of the enemy, which we must dry up, will be considered an enemy to his country.

"ART. 3. Every one caught in the act or being convicted of having infringed article 2 will be shot.

"MAXIMO GOMEZ."

ORDER JANUARY 10, 1896.

Considering that the operations of the sugar crop have become suspended in the western districts, and it being no longer necessary to burn the cane fields, I therefore issue the following order:

ARTICLE 1. The burning of the sugar-cane fields is hereby absolutely prohibited.

* * * * *

ART. 3. The buildings and machinery will be destroyed of all plantations that, despite this humane order, resume work.

MAXIMO GOMEZ, *General in Chief.*

HEADQUARTERS OF THE LIBERATING ARMY,
Plantation Mi Rosa, January 10, 1896.

The law of retaliation.

In the case of Fox and others (Edwards' reports, p. 314), Sir William Scott says:

In the particular case of the orders and instructions which give rise to the present question, the court has not heard it at all maintained in argument, that as *retaliatory* orders they are not conformable to such principles—for *retaliatory* orders they are. They are so declared in their own language, and in the uniform language of the government which has established them. I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory, and they would cease to be retaliatory from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate.

Sir William Scott, in the same case, also said:

I have not observed, however, that these orders in council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract.

Spanish retaliatory and other orders of devastation.

General Weyler's proclamation of February 16, 1896.

ARTICLE 1. All inhabitants of the rural districts in the jurisdiction of Sancti Spiritus, the provinces of Puerto Principe and Santiago de Cuba, must concentrate in places where the headquarters of a division, brigade, column, or troop of the army are situated, and must provide themselves with a document guaranteeing their persons within the space of *eight* days, reckoned from the date of the publication of this proclamation in the chief town of the municipal limits.

ART. 2. In order that persons may travel through the rural districts within the radius in which the columns are operating, a pass shall be absolutely necessary, such pass to be issued by the municipal alcaldes, military commandants, or officers in command of detachments. * * *

ART. 3. All country stores must be abandoned by their owners, and commanders of columns shall, in the case of such establishments, take such measures as they may deem conducive to the success of their operations, inasmuch as these stores are no benefit to the country and in the wooded or rural districts serve as lurking places for the enemy. * * *

VALERIANO WEYLER.

HABANA, *February 16, 1896.*

OFFICE OF THE GOVERNOR-GENERAL
OF THE ISLAND OF CUBA,
Havana, February 16, 1896.

PROCLAMATION, FEBRUARY 16, 1896.

* * * * *

The following persons, among others, for whose cases provision is made by law, shall be subject to military jurisdiction:

* * * * *

3. Those who shall burn property in inhabited or uninhabited districts. * * *

VALERIANO WEYLER.

General Weyler's proclamation of October 21, 1896:

All the inhabitants of the country or outside of the line of fortifications of the towns shall, within the period of eight days, reconcentrate themselves in the towns occupied by the troops.

* * * * *

The provisions of this proclamation are only applicable to the Province of Pinar del Rio.

VALERIANO WEYLER.

HAVANA, *October 21, 1896.*

Proclamation of General Weyler, December 1, 1896.

In view of the lack of resources for the subsistence of the families in the province of Pinar del Rio who have concentrated in the fortified towns as a result of my proclamation of October 21 last:

I hereby order: 1. That in each of the fortified towns of the said province there shall be marked out a belt for cultivation around the village and outside of the fortifications, in order that the residents of the town and the families from outside that have come in may cultivate articles of food, excepting such persons as have stores and those whose father or husband be with the insurgent forces.

VALERIANO WEYLER.

HEADQUARTERS IN RIO DE LOS PALACIOS, *December 1, 1896.*

PROCLAMATION OF GENERAL WEYLER, JANUARY 30, 1897.

ARTICLE I. Within eight days from the publication of this proclamation in the Habana Gazette all the owners of rural property * * * will call on the mayor of the nearest fortified town and, showing his personal identification papers * * * will furnish proofs of the ownership and of having paid the last quarter of taxes for territorial purposes which has been exacted. * * *

Those who prove their ownership * * * will receive from the municipal mayor a certificate. * * * Once they have got this certificate they will be allowed to return to their old homesteads, having the obligation of showing it when the troops go through their property, going to meet them.

Those who are not able to furnish all the above-mentioned testimonials will have to go and live in the fortified towns, where land will be granted them in the zones of cultivation.

ART. II. After the expiration of the above-mentioned term of eight days, the columns of troops, when going through the rural properties, should the specified certificate be not presented to the chief, will take the inhabitants to the nearest town, following the instructions they may have received for such cases.

VALERIANO WEYLER.

QUARTIER GENERAL OF LAS CRUCES, *January 30, 1897.*

PROCLAMATION OF GENERAL WEYLER, MAY 27, 1897.

ARTICLE 1. Being on the eve of beginning operations in the eastern portion of this island, * * * it is enacted as follows:

First, the organization of the zones of cultivation;

Second, the prohibition of there being any shops in places not fortified and shut up; and

Third, the concentration of the inhabitants of the rural country and destruction of anything useful in places where the instructions given are not carried into effect.

* * * * *

Headquarters at Sancti Spiritus, May the 27th, 1897.

WEYLER.

Extracts from General Grant's memoirs.

MONOCACY BRIDGE, MD., *August 5, 1864.*

* * * * *

In pushing up the Shenandoah Valley, where it is expected you will have to go first or last, it is desirable that nothing should be left to invite the enemy to return. Take all provisions, forage, and stock wanted for the use of your command; such as can not be consumed, destroy. It is not desirable that the buildings should be destroyed—they should rather be protected. But the people should be informed that so long as an army can subsist among them recurrences of these raids must be expected, and we are determined to stop them at all hazards.

U. S. GRANT,

Lieutenant-General.

Maj. Gen. D. HUNTER.

Vol. 2, pp. 581, 582.

On the 15th of September I started to visit General Sheridan in the Shenandoah Valley. My purpose was to have him attack Early, or drive him out of the valley and destroy that source of supplies for Lee's army. (Page 327.)

Now one of the main objects of the expedition began to be accomplished. Sheridan went to work with his command gathering in the crops, cattle, and everything in the upper part of the valley required by our troops, and especially taking what might be of use to the enemy. What he could not take away he destroyed, so that the enemy would not be invited to come back there. (Page 331.)

Sheridan having driven the enemy out of the valley, and taken the productions of the valley so that instead of going there for supplies the enemy would have to bring his provisions with him if he again entered it, recommended a reduction of his own force, the surplus to be sent where it could be of more use. (Page 335.)

The valley was so very important, however, to the Confederate army that, contrary to our expectations, they determined to make one more strike and save it if possible before the supplies should be all destroyed. * * *

On the 6th of October Sheridan commenced retiring down the valley, taking or destroying all the food and forage and driving the cattle before him, Early following. (Page 336.)

GRANT SPEAKS OF SHERMAN'S ATLANTA CAMPAIGN.

"*Sherman's orders for this campaign were perfect.*" The army was expected to live on the country, and to always keep the wagons full of forage and provisions against a possible delay of a few days.

The troops, both of the right and left wings, made most of their advance along the line of railroads, which they destroyed. (Page 361.)

* * * Everything in the shape of food for man and forage for beast was taken.
* * *

The captures consisted largely of cattle, sheep, poultry, some bacon, corn meal, often molasses, and occasionally coffee or other small rations.

The skill of these men, called by themselves and the army "bummers," in collecting their loads and getting back to their respective commands, was marvelous. (Page 363.)

Extracts from General Sheridan's Memoirs.

HEADQUARTERS MIDDLE MILITARY DIVISION,

Cedar Creek, Va., August 16, 1864.

GENERAL: In compliance with instructions of the Lieutenant-General commanding, you will make the necessary arrangements and give the necessary orders for the destruction of the wheat and hay south of a line from Millwood to Winchester and Petticoat Gap. You will seize all mules, horses, and cattle that may be useful to our Army. Loyal citizens can bring in their claims against the Government for this necessary destruction. No houses will be burned, and officers in charge of this delicate but necessary duty must inform the people that the object is to make this valley untenable for the raiding parties of the rebel army.

Very respectfully,

P. H. SHERIDAN,

Major-General, Commanding.

Brig. Gen. A. T. A. TORBERT,

Chief of Cavalry, Middle Military Division.

(Vol. 1, p. 485.)

CITY POINT, VA.,

August 16, 3.30 p. m., 1864.

Major-General SHERIDAN, *Winchester, Va..*

If you can possibly spare a division of cavalry, send them through Loudoun County to destroy and carry off the crops, animals, negroes, and all men under 50 years of age capable of bearing arms. In this way you will get many of Mosby's men. All male citizens under 50 can fairly be held as prisoners of war, not as citizen prisoners. If not already soldiers, they will be made so the moment the rebel army gets hold of them.

(Page 486.)

U. S. GRANT, *Lieutenant-General.*

HEADQUARTERS ARMIES OF THE UNITED STATES,

City Point, August 21, 1864.

Major-General SHERIDAN, *Charlestown, Va..*

In stripping Loudoun County of supplies, etc., impress from all loyal persons so that they may receive pay for what is taken from them. I am informed by the Assistant Secretary of War that Loudoun County has a large population of Quakers who are all favorably disposed to the Union. These people may be exempted from arrest.

(Page 486.)

U. S. GRANT, *Lieutenant-General.*

HEADQUARTERS ARMIES OF THE UNITED STATES,
City Point, Va., August 26, 1864—2.30 p. m.

* * * * *

Do all the damage to railroads and crops you can. Carry off stock of all descriptions, and negroes, so as to prevent further planting. If the war is to last another year we want the Shenandoah Valley to remain a barren waste.

U. S. GRANT, *Lieutenant-General.*

(Page 486.)

HEADQUARTERS ARMIES OF THE UNITED STATES,
City Point, Va., September 4, 1864—10 a. m.

* * * * *

It is our interest that that county should not be capable of subsisting a hostile army, and at the same time we want to inflict as little hardship upon Union men as possible.

U. S. GRANT, *Lieutenant-General.*

(Page 487.)

WOODSTOCK, *October 7, 1864—9 p. m.*

(Received 9th.)

I have the honor to report my command at this point to-night. I commenced moving back from Port Republic, Mount Crawford, Bridgewater, and Harrisonburg yesterday morning. The grain and forage in advance of these points up to Staunton had previously been destroyed. In moving back to this point the whole country from the Blue Ridge to the North Mountains has been made untenable for a rebel army. I have destroyed over 2,000 barns filled with wheat, hay, and farming implements; over 70 mills filled with flour and wheat; have driven in front of the army over 4,000 head of stock, and have killed and issued to the troops not less than 3,000 sheep. This destruction embraces the Luray Valley and Little Fort Valley, as well as the main valley. A large number of horses have been obtained, a proper estimate of which I can not now make.

* * * * *

To-morrow I will continue the destruction of wheat, forage, etc., down to Fishers Hill. When this is completed the valley, from Winchester up to Staunton, 92 miles, will have but little in it for man or beast.

* * * * *

P. H. SHERIDAN, *Major-General.*

Lieutenant-General GRANT.

[The foregoing is from the Official Records of the Union and Confederate Armies, Series I, Vol. XLIII, Part I, pp. 30, 31.]

CITY POINT, VA., *November 9, 1864.*

Major-General SHERIDAN, *Cedar Creek, Va.:*

Do you not think it advisable to notify all citizens living east of the Blue Ridge to move out north of the Potomac all their stock, grain, and provisions of every description? There is no doubt about the necessity of clearing out that country so that it will not support Mosby's gang. And the question is whether it is not better that the people should save what they can. So long as the war lasts they must be prevented from raising another crop, both there and as high up the valley as we can control.

U. S. GRANT, *Lieutenant-General.*

(Page 487.)

HEADQUARTERS MIDDLE MILITARY DIVISION,

November 27, 1864.

Bvt. Maj. Gen. WESLEY MERRITT,
Commanding First Cavalry Division.

GENERAL: You are hereby directed to proceed to-morrow morning at 7 o'clock with the two brigades of your division now in camp to the east side of the Blue Ridge, via Ashby's Gap, and operate against the guerrillas in the district of country bounded on the south by the line of the Manassas Gap Railroad as far east as White Plains, on the east by the Bull Run range, on the west by the Shenandoah River, and on the north by the Potomac. This section has been the hotbed of lawless bands, who have, from time to time, depredated upon small parties on the line of army communications, on safeguards left at houses, and on all small parties of our troops. Their real object is plunder and highway robbery. To clear the country of these parties that are bringing destruction upon the innocent as well as their guilty supporters by their cowardly acts, you will consume and destroy all forage and subsistence, burn all barns and mills and their contents, and drive off all stock in the region the boundaries of which are above described. This order must be literally executed, bearing in mind, however, that no dwellings are to be burned, and that no personal violence be offered to the citizens. The ultimate results of the guerrilla system of warfare is the total destruction of all private rights in the country occupied by such parties. This destruction may as well commence at once, and the responsibility of it must rest upon the authorities at Richmond, who have acknowledged the legitimacy of guerrilla bands. The injury done this army by them is very slight. The injury they have indirectly inflicted upon the people and upon the rebel army may be counted by millions. The Reserve Brigade of your division will move to Snickersville on the 29th. Snickersville should be your point of concentration, and the point from which you should operate in destroying toward the Potomac. Four days' subsistence will be taken by the command. Forage can be gathered from the country through which you pass. You will return to your present camp, via Snicker's Gap, on the fifth day,

By command of Maj. Gen. P. H. Sheridan:

JAS. W. FORSYTH,
Lieutenant-Colonel and Chief of Staff.

[The foregoing is from the Official Records of the Union and Confederate Armies, Series I, Vol. XLIII, Part II, p. 679.]

Extract from Sheridan's Memoirs.

I indorsed the programme in all its parts, for the stores of meat and grain that the valley provided and the men it furnished for Lee's depleted regiments were the strongest auxiliaries he possessed in the whole insurgent section. In war a territory like this is a factor of great importance, and whichever adversary controls it permanently reaps all the advantages of its prosperity. Hence, as I have said, I indorsed Grant's programme, for I do not hold war to mean simply that lines of men shall engage each other in battle and material interests be ignored. This is but a duel, in which one combatant seeks the other's life; war means much more and is far worse than this. Those who rest at home in peace and plenty see but little of the horrors attending such a duel and even grow indifferent to them as the struggle goes on, contenting themselves with encouraging all who are able-bodied to enlist in the cause, to fill up the shattered ranks as death thins them. It is another matter, however, when deprivation and suffering are brought to their own doors. Then the case appears much graver, for the loss of property weighs heavy with the most of

mankind; heavier often than the sacrifices made on the field of battle. Death is popularly considered the maximum of punishment in war; but it is not. Reduction to poverty brings prayers for peace more surely and more quickly than does the destruction of human life, as the selfishness of man has demonstrated in more than one great conflict.

(Vol. 1, pp. 487-488.)

Extracts from memoirs of General Sherman.

Until we can repopulate Georgia it is useless for us to occupy it; but the utter destruction of its roads, houses, and people will cripple their military resources. By attempting to hold the roads we will lose a thousand men each month, and will gain no result. I can make this march and make Georgia howl! (Vol. 2, p. 152.)

I would infinitely prefer to make a wreck of the road and of the country from Chattanooga to Atlanta, including the latter city; send back all my wounded and unserviceable men, and with my effective army move through Georgia, smashing things to the sea. (Page 153.)

* * * When the enemy broke our railroads we were perfectly justified in stripping the inhabitants of all they had. I remember well the appeal of a very respectable farmer against our men driving away his fine flock of sheep. I explained to him that General Hood had broken our railroad; that we were a strong, hungry crowd, and needed plenty of food; that Uncle Sam was deeply interested in our continued health, and would soon repair these roads, but meantime we must eat; we preferred Illinois beef, but mutton would have to answer. Poor fellow! I don't believe he was convinced of the wisdom or wit of my explanation. (Page 158.)

I propose to abandon Atlanta and the railroad back to Chattanooga, to sally forth to ruin Georgia and bring up on the seashore. (Page 159.)

In looking around the room I saw a small box, like a candle box, marked "Howell Cobb," and, on inquiring of a negro, found that we were at the plantation of Gen. Howell Cobb, of Georgia, one of the leading rebels of the South, then a general in the Southern army, and who had been Secretary of the United States Treasury in Mr. Buchanan's time. Of course we confiscated his property, and found it rich in corn, beans, peanuts, and sorghum molasses. Extensive fields were all round the house. I sent word back to General Davis to explain whose plantation it was, and instructed him to spare nothing. That night huge bonfires consumed the fence rails, kept our soldiers warm, and the teamsters and men, as well as the slaves, carried off an immense quantity of corn and provisions of all sorts. (Pages 185-186.)

I do sincerely believe that the whole United States, North and South, would rejoice to have this army turned loose on South Carolina, to devastate that State in the manner we have done in Georgia. (Page 213.)

HEADQUARTERS OF THE ARMY,
Washington, December 18, 1864.

Maj. Gen. W. T. SHERMAN,
Savannah (via Hilton Head):

Should you capture Charleston I hope that by some accident the place may be destroyed, and if a little salt should be sown upon its site it may prevent the growth of future crops of nullification and secession. (Page 223.)

Yours, truly,

H. W. HALLECK,
Major-General, Chief of Staff.

(See Halleck on International Law, vol. 2, pp. 2 and 75. See below note 2 of this opinion on Limitations of Devastation.)

WASHINGTON, July 17, 1864—noon.

Major-General HUNTER,

Harpers Ferry, W. Va.:

General Grant has directed * * * "If Hunter can not get to Gordonsville and Charlottesville to cut the railroads, he should make all the valleys south of the Baltimore and Ohio road a desert as high up as possible. I do not mean that houses should be burned, but every particle of provisions and stock should be removed and the people notified to move out." He further says "that he wants your troops to eat out Virginia clear and clean as far as they go, so that crows flying over it for the balance of the season will have to carry their provender with them."

H. W. HALLECK,

Major-General and Chief of Staff.

(War of the Rebellion. Official Records of the Union and Confederate Armies. Series 1, Vol. XXXVII, Part II, p. 366.)

NOTE 2.—LIMITATIONS OF DEVASTATION.

Hall on International Law, 555.

The measure of permissible devastation is to be found in the strict necessities of war.

* * * Destruction, on the other hand, is always illegitimate when no military end is served. * * * Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender.

Hall on International Law, 554, sec. 186.

At the same time devastation was still theoretically regarded as an independent means of attack. Wolff declares it to be lawful both as a punishment and as lessening the strength of an enemy. Vattel not only allows a country to be "rendered uninhabitable, that it may serve as a barrier against forces which can not otherwise be arrested," but treats devastation as a proper mode of chastising a barbarous people; and Moser in like manner permits it both in order to "deprive an enemy of subsistence which a territory affords to him," and "to constrain him to make peace." But every few years an advance in opinion is apparent. De Martens restricts further the occasions upon which recourse can be had to devastation. Property, he says, may be destroyed which can not be spared without prejudicing military operations, and a country may be ravaged in extraordinary cases either to deprive an enemy of subsistence or to compel him to issue from his positions in order to protect his territory.

Hall defines the accepted doctrine of modern times, as to the permissible exercise of the right of devastation, in the following terms:

The right being thus narrowed, it is easy to distinguish between three groups of cases, in one of which devastation is always permitted, while in a second it is always forbidden, and in a third it is permitted in certain circumstances. To the first group belong cases in which destruction is a necessary concomitant of ordinary military action, as when houses are razed or trees cut down to strengthen a defensive position, when the suburbs of a fortified town are demolished to facilitate the attack or defense of the place, or when a village is fired to cover the retreat of an army. * * * Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender; it would even be impossible to deny to an invader the right to cut the dikes of Holland to save himself from such a fate; but when, as in the case supposed, the devastation is extensive in scale and lasting in effect, modern opinion would demand that the necessity should be extreme and patent. (Int. Law, p. 555.)

Wheaton says that—

The same rule which determines how far it is lawful to destroy the persons of enemies will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary in order to accomplish the just ends of war, it may be lawfully done; but not otherwise. (Int. Law, S. 347, pp. 434-439.)

General Halleck says:

Moreover, there is a limit to public enmity. The law of nature gives to a belligerent nation the right to use such force as may be necessary in order to obtain the object for which the war was undertaken. Beyond this the use of force is unlawful. This necessity forms the limit of hostility between subjects of the belligerent States. They, therefore, have no right to take the lives of noncombatants, or of such public enemies as they can subdue by other means, nor to inflict any injuries upon them or their property unless the same should be necessary for the object of the war. (Halleck's Int. Law, vol. 2, p. 2.)

While there is some uncertainty as to the exact limit fixed by the voluntary law of nations to our right to appropriate to our own use the property of an enemy or to subject it to military contributions, there is no doubt whatever respecting its waste and useless destruction. This is forbidden alike by the law of nature and the rules of war. But if such destruction is necessary in order to cripple the operations of the enemy, or to insure our own success, it is justifiable. Thus, if we can not bring off a captured vessel we may sink or burn it in order to prevent its falling into the enemy's hands, but we can not do this in mere wantonness. We may destroy provisions and forage in order to cut off the enemy's subsistence, but we can not destroy vines and cut down fruit trees without being looked upon as savage barbarians. We may demolish fortresses, ramparts, and all structures solely devoted to the purposes of war; but, as already stated, we can not destroy public or private edifices of a civil character, temples of religion, and monuments of art, unless their destruction should become necessary in the operations of a siege, or in order to prevent their affording a lodgment or protection to the enemy. (Halleck's Int. Law, vol. 2, pp. 75-76.)

NOTE 3.—REVOCATION OF EMBARGOES NOT AN ADMISSION THAT THEY WERE ILLEGAL.

Before the Commission of 1871-1882, Mr. McPherson, counsel for Spain, stated distinctly (Moore, 3769) as to the revocation of embargoes:

The decree of July 12, 1873, was merely a change of policy on the part of the Spanish cabinet, and can not be construed as in any sense an admission of the illegality of the measure which it was designed to discontinue.

NOTE 4.—EMBARGOES WERE VIOLATIONS OF INTERNATIONAL LAW.

In the brief of Shipman & Larocque of February 28, 1903, page 7, they say that the Spanish embargoes in Cuba which were the subject of reclamation in 1870 and 1871 were violations of the treaty of 1795 "and of the general rules of international law."

NOTE 5.—NEUTRAL ALIENS MUST SUFFER THE FORTUNES OF WAR.

Hall on International Law, section 278.

"SECTION 278. As a State possesses jurisdiction, within the limits which have been indicated, over the persons and property of foreigners found upon its land and waters, the persons and property of neutral individuals in a belligerent State are

in principle subjected to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the State as the existence of hostilities may render necessary, provided that no further burden is placed upon foreigners than is imposed upon subjects.

"So, also, as neutral individuals within an enemy State are subject to the jurisdiction of that enemy and are so far intimately associated with him that they can not be separated from him for many purposes; they and their property are as a general principle exposed to the same extent as noncombatant enemy subjects to the consequences of hostilities. Neutral persons are placed in the same way as subjects of the State under the temporary jurisdiction of the foreign occupant, acts of disobedience are punishable in like manner, and the belligerent is not obliged, taking them as a body, to show more consideration to them in the conduct of his operations than he exhibits toward other inhabitants of the country—he need not, for example, give them an opportunity of withdrawing from a besieged town before bombardment, which he does not accord to the population at large. Their property is not exempt from contributions and requisitions. * * *

The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the State is clear and indisputable; and no objection can be made to its effect upon property which is associated either permanently or for a considerable time with the belligerent territory.

General Halleck says :

With respect to the rights of neutral individuals residing in a belligerent territory in 1870, during the Franco-German war, the British law officers were of opinion that British subjects having property in France were not entitled to any special protection for their property, or to exemption from military contributions to which they might be liable in common with the inhabitants of the place in which they resided, or in which their property might be situated. * * * The British law officers were of opinion that British subjects residing in France had no just cause of complaint against the French authorities in the event of their property being destroyed by an invading army. (Halleck's Int. Law, vol. 2, p. 144.)

NOTE 6.—ASSERTIONS OF CLAIMANTS THAT UNITED STATES IS A TRUSTEE FOR THEM.

Extract from brief of Henry Randall Webb and Clifford S. Walton, page 13.

Sixth. In fact, the United States can not offer the same defenses which Spain would have been able to make prior to the ratification of the treaty of December 10, 1898. The United States has recognized the existence, legality, and validity of these claims, has for a good consideration released Spain from all liability for their payment, and has actually received payment of them in behalf of its citizens, and therefore stands in the position of a trustee with a fund in its hands to be distributed among those for whose benefit it was collected and received.

Mr. Carlisle, in his argument on June 2, 1902, said:

Now the United States presented these claims to Spain and that Government denied all liability for them, * * * finally the United States intervened and by prosecuting a war against Spain compelled her to recognize the claims and to pay them. (Page 5.) It has been admitted that there were valid claims. Spain admitted it and paid them to the United States. (Page 8.) It is purely a domestic question between the United States and their own citizens whose money the United States have received. (Page 18.)

And in reply to a question he proceeded to state the principle of adjudication which he thought should govern the Commission, namely, that the United States should pay because "Spain had paid the claims by the cession of territory, and the United States had assumed to adjudicate and settle them, which means pay them."

NOTE 7.—U. S. CLAIMS NOT GROUNDS FOR GOING TO WAR.

Extract from brief of Shipman & Larocque of February 28, 1903, page 34.

Our claims for indemnity were not a professed ground for the late war, the acts of Spain which gave rise to such claims having been confessedly violations of our treaty rights. The prevention of *further* violations, however, and of the total destruction of American interests in Cuba was a professed ground of our armed intervention.

NOTE 8.—THE UNITED STATES NEVER ASSERTED THAT THE CLAIMS WERE GOOD CLAIMS.

Secretary Olney, as has been seen, expressly refrained from asserting the justice of any one of the claims. The subsequent general allusions to the claims in the course of the events recited in the text of this opinion could not by any possibility be construed as assertions by the United States or admissions by Spain that all the claims were good. The most liberal inference could only be that we asserted that *some* of them were good, and that Spain admitted that *some* of them were good. Thereupon all claims were released, and the United States undertook by adjudication to find out what were good and what were bad, and to pay the good claims only. This undertaking of adjudication is now going forward.

NOTE 9.—THE CALDERA CASE.

None of the cases now before this Commission are like that of the *Caldera* (15 Ct. Claims, 546; 16 Ct. Claims, 635), which has been often cited to us and much commented upon. On October 7, 1854, the Chilean bark *Caldera*, having on board merchandise belonging to citizens of the United States, sailing from Hongkong for San Francisco, encountered a typhoon, which badly strained the vessel, brought on leaking, and caused other damages, so that she sought shelter in a Chinese bay, where she was seized by Chinese pirates, plundered of the effects on board, and set on fire. On account of the *Caldera* claims and other claims China was compelled by the pressure of the United States to pay the gross sum of about \$750,000; a convention of November 8, 1858, was made, which was ratified by an act of Congress of March 3, 1859 (11 Stats., 408), and it was provided that commissioners should be appointed to receive and examine all claims which may be "presented to them under the said convention, according to the provisions of the same, the principles of justice, and international law."

The Commission held that China was liable for the piratical acts, that the *Caldera* claims were just, and allowed 40 per cent of the several claims and disallowed the remaining 60 per cent on the ground that prior to the acts of piracy both vessel and cargo had been damaged to the extent of 60 per cent by perils of the sea—which 40 per cent was duly paid. Nineteen years later, on June 19, 1878, Congress passed an act (20 Stats., 171) authorizing any person holding or making any claim upon the balance of the fund for loss sustained by the plunder and destruction of the *Caldera* to bring suit in the Court of Claims, and the court was authorized to “hear and determine such claim or demand according to the principles of justice and international law.” The Court of Claims, upon suits brought by the *Caldera* claimants to recover the 60 per cent which had been withheld decided (by Drake, C. J.) as follows:

Whether according to international law the claimants had in the first instance, valid claims against China for the loss and destruction of the *Caldera* we do not consider an open question as between the United States and these claimants.

The reasons given for this conclusion were

(1) That the President had examined the claims “and had not only decided that they were just claims against China, but had ordered a peremptory demand upon China for their settlement.”

(2) That China “had acknowledged her international liability” for the claims, and had paid \$750,000 “in full liquidation of all claims of American citizens,” “specifying none, but paying a gross sum which the United States received, and undertook to ascertain, determine, and satisfy out of that sum all claims of American citizens against China.”

(3) That the Board of Commissioners was required to examine claims “according to the principles of international law;” and the United States declared, by the law under which it was appointed, that its decision on all claims brought before it should be final. In every case presented to it the initial and fundamental question was whether, according to international law, the claim was a legitimate one against China. That question the board decided in favor of each of the claims, of which those now before us were a part, except that of Captain Rooney; and we are satisfied that it would have allowed them in their entirety, if the commissioners had not, upon what they regarded as sufficient evidence, deemed it their duty to disallow 60 per cent of them, because of damage by perils of the sea, sustained before the loss and destruction of the *Caldera* by the pirates.

Therefore, by the diplomatic act of the United States, by that of China, and by the action of the board, we consider the original liability of China, according to international law, for the *Caldera* claims, a point settled, and not now reexaminable here.

But the act under which we are now proceeding seems to us, in itself, when considered in connection with all the circumstances, to be a recognition of the validity, under international law, of those claims. As before suggested, that act was passed with full knowledge on the part of Congress of every fact which ever transpired in regard to them. The diplomatic correspondence about them, the positions respectively taken by our Government and that of China concerning them, the action of the board, all were as well known to Congress when it passed the act as they are to us to-day, and is it at all supposable that that body could not see as clearly as the President did in 1855 that the claims of these parties were, according to international law,

legitimate claims against China? And if Congress had not so considered them, is it conceivable that the door of this court would have been opened for their presentation here?

It is my answer to this to point to the words of the statute requiring us to hear and determine these claims "according to international law." That was but a continuance, in terms, of the rule of decision prescribed by the act of 1859. In view of the possibility of new claims being presented, on account of the *Caldera's* destruction, which had not been brought before the board, it was eminently proper that every such claim should be subjected to the same rule of decision that had been applied to those upon which the board had previously passed; but it could not be supposed necessary to apply that test a second time to the claims which the board had allowed in part; for that partial allowance was as clear a determination of the original liability of China as if the whole amount demanded had been allowed.

So, in any and every view of the matter, it seems to us beyond reasonable doubt that the question of the original liability of China on account of the destruction of the *Caldera* has been every way decided against China by both the executive and legislative departments of our Government, and, as to claims partially allowed by the board, can not be now raised in this court.

Further referring to the language of the act of Congress, the Chief Justice says:

These comprehensive terms, taken in connection with the fact that it was well known to Congress when it passed the act that all the claims now sued on had been before the board, and that 40 per cent of them had been allowed and paid and 60 per cent disallowed, lead us to the conclusion that it was the intention of Congress to grant these claimants a rehearing before this court as to the disallowed 60 per cent, for otherwise the act refers nothing whatever to us.

Thereupon the court, proceeding to consider only the question what was the value of the *Caldera* and her cargo and effects when she sailed and what damage she sustained by the perils of the sea before capture, decided that according to the findings of the old board in China there was no evidence as to the amount of such sea damage, and therefore the court allowed to the claimants the 60 per cent which the board had disallowed.

Chief Justice Drake's opinion was concurred in by Justices Nott and Hunt. Mr. Justice J. C. Bancroft Davis dissented in a full and elaborate opinion, concurred in by Mr. Justice Richardson. The case went to the Supreme Court, where the justices were equally divided in opinion, and therefore the decision of the Court of Claims stood for the benefit of the claimants.

Five years later, by act of March 3, 1885 (23 Stat., 436), the United States returned to China the \$583,400.90 which we had excessively exacted of her, less the further sum of \$130,000 arbitrarily deducted to pay the executor of one Charles E. Hill for the use and loss of the steamer *Keorgeor* in 1863.

The dissenting opinion by Mr. Justice J. C. Bancroft Davis concludes as follows:

1. That the executive and legislative branches of the Government have (each by separate action) indicated an opinion that the Chinese indemnity fund belongs to

China, except as to claims for which China was internationally responsible under the provisions of the treaty of 1844 and the claims convention of November, 1848.

2. That China was not internationally liable for the acts of the pirates at Koelan.

3. That if so liable, it was liable only for the value of the property at the time of its seizure by the pirates.

4. That that value was proved to the satisfaction of the commissioners who were authorized to audit it.

5. That their audit was approved by the diplomatic representative of the United States and became an "award" under the statute of 1859.

6. That in proceedings under the act of 1878 the claimants can refer to that award to prove their title to the property seized and its forcible capture, and that without such reference there is no evidence of title in the record or findings.

7. That the claimants having proved affirmatively that all the property had suffered sea damage before its arrival at Koelan, the burden of proof is on them to show the amount of that injury, if they rely upon the policies and invoices as evidences of value.

8. That the award is *prima facie* evidence to prove the value of the property at the time of the seizure, and that it is collaterally supported by other facts in the findings and in official documents printed by order of Congress.

9. That no other evidence as to the value of the property at the time of the seizure being offered by the claimants under the provisions of the act of 1878, the award is conclusive on that point.

10. That the awards which were favorable to the claimants were right as to amounts; or if there was any error it was in their favor.

11. That the representative of Rooney can not recover, because China was not responsible for his losses.

It is apparent from the foregoing examination of the *Caldera* case that it imposes no obligation upon this Commission in connection with the pending claims. The two peculiar facts upon which the Court of Claims mainly rested—(1) the prior adjudication of the board in China, and (2) the evident purpose of the new act of Congress—sufficiently differentiate the *Caldera* claims from the present questions. There are other differences.

NOTE 10.—INTERNATIONAL LAW. HOW ASCERTAINED.

In the *Paquete Habana*, 175 U. S., 700, Mr. Justice Gray cites the following authorities to show what the court considers international law to be:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is. *Hilton v. Guyot* (159 U. S., 113, 163, 164, 214, 215).

Wheaton places, among the principal sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." (Wheaton's International Law (8th ed.), sec. 15.)

Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law." (1 Kent Com., 18.)

Halleck's International Law, vol. 1, page 57, section 20:

The history of transactions relating to the intercourse of States, both in peace and war, is one of the most faithful sources of international law. What is called the voluntary or positive law of nations is mainly derived from usage and custom, and to determine these we must have recourse to the history of what has passed from time to time among the several nations of the world; not that history will afford us the record of any constant and uninterrupted practice, but because we shall there find what has been generally approved and what has been generally condemned in the variable and contradictory practice of nations; "for," in the words of Grotius, "such a universal approbation must arise from some universal principle, and this universal principle can be nothing else but the common sense or reason of mankind."

In the *Scotia* (81 U. S., 170)—a collision case decided in 1871—the court (by Mr. Justice Strong) say:

Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations.

The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules

which the constant changes in the instruments and necessities of navigation require. Changes nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9, 1863, and in our act of Congress of 1864 accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libelants complain took place. This is not giving to the statutes of any nation extra territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation.

NOTE 11.—CLAIMANTS' VIEW THAT ALL CLAIMS MUST BE PAID.

The duties of this honorable Commission are confined to the consideration of three things: (1) The citizenship of the claimants; (2) the fact of the loss and injury; (3) the amount and extent of the damage and injury suffered. (Brief of Messrs. Webb & Walton, p. 13.)

NOTE 12.—CITATION IN TEXT IS FROM BRIEF OF HERBERT & MICOU,
FEBRUARY 7, 1903, PAGE 2.

NOTE 13.—CITATION IN TEXT IS FROM BRIEF OF HERBERT & MICOU,
FEBRUARY 7, 1903, PAGE 2.

NOTE 14.—CLAIMANTS' CONTENTION THAT THE RESULT OF THE WAR
COMPELS SPAIN TO PAY ALL CLAIMS.

Extract from brief of Herbert & Micou, page 20.

Our contention is that it was the proper function of the President to look after and care for the interests of American citizens in Cuba during the insurrection; that it was for him to announce to the Spanish authorities the degree and measure of protection which this Government claimed should be extended to our citizens and their property in Cuba. That whatever claims of right are found to have been deliberately and carefully put forward by the Executive Department of the Government are to be considered as claims insisted upon by the Government of the United States. That the judgment of the Executive Department as to the status, under the rules of international law, of the insurrectionists in Cuba is conclusive. That the judgment of the President and of Congress that the war waged by the Spanish authorities against the insurrectionists *was outside the pale of civilized warfare, and therefore not to be justified by the rules of international law, is also conclusive.* That the motives avowed and recitals of fact by the President in his message, and by the Congress of the United States in their joint resolution, as reasons for intervention in Cuba are beyond criticism by this Commission, which can render no judgment the effect of which would be to impugn or confute any of such statements. And, finally, that this Commission certainly must judicially take notice that the result of the Spanish-American war, in so far as not modified by the treaty of Paris, was a vindication of the American case against Cuba as it stands of record. War settled all the questions involved.

Per contra.—In the brief of Shipman & Larocque, of February 28, 1903, page 32, it is said:

The *principle of liability* involved in these claims was not an issue of the late war, and the right of the present claimants to recover does not depend upon the arbitrament of the war. The principles upon which the present claims are based became binding as rules of international law before that conflict had commenced.

NOTE 15.—CLAIMANTS' CONTENTION THAT COMMISSION IS CONCLUSIVELY BOUND BY ACTION OF UNITED STATES EXECUTIVE.

Mr. Carlisle, in his oral argument of June 2, 1902, page 24, says:

This tribunal is bound not only by the conclusions reached by the political department of the Government concerning its relations with foreign States and with insurgents in foreign States, but it is also bound by every fact upon which the political department of the Government based its conclusions. I think that this is perfectly sound, because if the court can reexamine the facts upon which the political department based its conclusions, it can also reexamine the conclusions and determine whether they were correct or not. It would not reexamine the facts upon which the political department based its conclusions and acts simply as a matter of curiosity, but if done at all it must be done for some purpose, and that purpose could only be to see whether the conclusions were or were not correct, something which no court sitting in this country has a right to do.

Extract from brief of Shipman & Larocque of February 28, 1903, page 35.

This Commission, having been authorized and directed by Congress to apply to the present claims the rules of international law, is bound to apply those rules which are properly applicable thereto; in other words, the rules which the political department of the Government have declared to be controlling.

The eloquent counsel for claimants who spoke on January 31, 1903, in his announcement that Mr. McKinley's statement that concentration was not civilized warfare, was a conclusive declaration of a principle of international law applied to facts which could never thereafter be disputed, calls the statement an incubus upon the counsel for the Government, and felicitously triumphs over them thus: "It confronts them like Banquo's ghost, and will not down; disturbs their rest as the slumbers of Richard were disturbed by the spirits of his victims; as Sinbad, with the old man of the sea; they can not shake it off."

NOTE 16.—MR. PAUL FULLER'S ARGUMENT OF JAN. 31, 1902, PAGE 33.

NOTE 17.—CONCURRENT RESOLUTION OF CONGRESS, 1896.

Resolved by the Senate (the House of Representatives concurring therein), That in the opinion of Congress a condition of public war exists between the Government of Spain and the government proclaimed and for some time maintained by force of arms by the people of Cuba; and that the United States of America should maintain a strict neutrality between the contending powers, according to each all the rights of belligerents in the ports and territory of the United States. Resolved further, That the

friendly offices of the United States should be offered by the President to the Spanish Government for the recognition of the independence of Cuba.

Senate.—Vote in Senate, February 28, 1896—Yeas 64, nays 6. (Record, vol. 28, p. 2257.)

House.—Cuba resolutions, Record, vol. 28, p. 3627. April 6, 1896. Vote on conference report in House—Yeas 247, nays 27.

Secretary Olney took strong ground against the implication that this concurrent resolution of Congress ought to have any influence with President Cleveland while making his decision not to recognize the belligerency of the Cuban Republic, and in a newspaper interview he stated that the recognition of a new nation was the prerogative of the President alone and none of the business of Congress. It was not clear whether he meant not only that Congress could do nothing toward recognition by a concurrent resolution not presented to the President, but also that such a resolution would be ineffectual even if passed by Congress over a Presidential veto. If he meant to assert the latter proposition, the writer of the present opinion maintains that he was clearly mistaken. The Constitution is explicit on this point. After enumerating 17 special powers of Congress it says:

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

It is difficult, against the broad language of this section, to seriously contend that the exercise of all the powers of the Government, including those of the President, is not subject to regulation and control by laws of Congress duly enacted;—and any law may be enacted over a veto from the President by a two-thirds vote, and then the Constitution says “it shall become a law.”

The powers of government specifically granted to the President are only four: (1) To command the Army and Navy; (2) to grant pardons; (3) to make treaties, two-thirds of the Senate concurring; and (4) to make appointments to office, and beyond such service he is only to take care that the laws be faithfully executed. To what extent the exercise of the four powers above named may be regulated and controlled by law without the laws being declared unconstitutional by the Supreme Court is not fully settled. But there should be little doubt that if the President were to recognize a new foreign state Congress could by law reverse that recognition and command the President to make a different recognition, and *a fortiori* it might recognize a new state which he refused to recognize. Our marvelous Constitution was wisely so framed as to guard against excessive and tyrannical executive power, of which the colonies had seen enough in old England and felt enough in new America. Soon, it is to be hoped, Americans will disregard recent tendencies and accept the fact that, subject only to the appropriate judicial restraint, the ultimate sovereignty of the United

States is vested in the Congress, acting by paramount laws passed with the approval of the President, or without his approval by a two-thirds vote.

NOTE 18.

Chief Justice Fuller states the dissent to be because the dissenting judges differ as to the international rule relative to fishing vessels. He says:

This court holds otherwise, not because such exemption is to be found in any treaty, legislation, proclamation, or instruction granting it, but on the ground that the vessels were exempt by reason of an established rule of international law applicable to them which it is the duty of the court to enforce. I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war.

NOTE 19.

It will be interesting to all who desire to pursue this question further than the text of this opinion carries it to read in addition to Lord Stowell's words in the case of the *Maria* (1) his utterance in 1799 in the *Flad Oyen* case; (2) his justification of his enforcement in 1811 of the British orders in council in the Fox case; (3) the criticisms of the Edinburgh Review, which are herewith given; (4) some observations of Sir Travers Twiss, and (5) some remarks of General Halleck (1 Int. Law, 58).

In the case of the *Flad Oyen*, on January 16, 1799 (1 C. Robinson, 141), Sir William Scott says:

It is my duty not to admit that because one nation has thought proper to depart from the common usage of the world and to meet the notice of mankind in a new and unprecedented manner that I am on that account under the necessity of acknowledging the efficacy of such a novel institution merely because general theory might give it a degree of countenance independent of all practice from the earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage of the matter; and when I am told that before the present war no sentence of this kind has ever been produced in the annals of mankind, and that it is produced by one nation only in this war, I require nothing more to satisfy me that it is the duty of this court to reject such a sentence as inadmissible. More must be proved; it must be shown that it is conformable to the usage and practice of nations. (P. 140.)

In the case of Fox and others in 1811 (Dr. Thomas Edwards's Book of Admiralty Reports of Sir William Scott's decisions, published in 1815, p. 311) an American vessel had been taken in 1810 on a voyage from Boston to Cherbourg, and the captors contended that the ship and cargo being destined to a port in France were liable to confiscation under the English orders in council of April 26, 1809; the defense being that the orders were extinct, having been retaliatory

and France having retracted her measures which had provoked the orders. The prize court condemned the ship by reason of a lack of evidence that France had retracted her decrees.

Sir William Scott said:

In the course of the discussion a question has been started, What would be the duty of the court under orders in council that were repugnant to the law of nations? It has been contended on one side that the court would at all events be bound to enforce the orders in council; on the other, that the court would be bound to apply the rule of the law of nations adapted to the particular case, in disregard of the orders in council. I have not observed, however, that these orders in council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract.

And therefore it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes upon me, that I observe that this court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed toward this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law, evidenced in the course of its decisions, and collected from the common usage of civilized states. At the same time it is strictly true that by the constitution of this country the king in council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this court. These two propositions—that the court is bound to administer the law of nations, and that it is bound to enforce the king's orders in council—are not at all inconsistent with each other, because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the court itself—or they are positive regulations, consistent with those principles applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

The constitution of this court relatively to the legislative power of the king in council, is analogous to that of the courts of common law relatively to that of the parliament of this kingdom. Those courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written or statute law in acts of parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the courts could extract from mere general speculations. What would be the duty of the individuals who preside in those courts if required to enforce an act of parliament which contradicted those principles, is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition that any such will arise. In like manner this court will not let itself loose into speculations as to what would be its duty under such an emergency, because it can not, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law. In the particular case of the orders and instructions which give rise to the present question, the court has not heard it at all maintained in argument that as *retaliatory* orders they are not conformable to such principles—for *retaliatory* orders they are. They are so declared in their own language, and in the uniform language of the government which has established them. I have no hesitation in

saying that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate.

The Edinburgh Review article for February, 1812, volume 19, page 290, on "Disputes with America," quotes from Sir William Scott in the *Flad Oyen* case as follows (p. 302):

Sir W. Scott combats the argument that the practice followed in some instances by Great Britain, of condemning prizes in neutral ports, could ever justify France in a similar proceeding. * * * It is *monstrous* to suppose that, because one country has been guilty of an irregularity, every other country is let loose from the law of nations and is at liberty to assume as much as it thinks fit (1 Rob., 142).

The Edinburgh Review article (p. 309) then proceeds:

The prize courts are understood to be judicatures which decide the questions coming before them according to the principles of the general law of nations, recognized all over the civilized world. This law is proverbially the same in every country, like that of nature, *non est alia Romae, alia Athenis*. Were it otherwise, indeed, there could be no such thing, and to speak of a *law of nations* would be a mockery. Two parties, then, come before such a court, the one demanding condemnation of a vessel or cargo seized under a certain order of council, and the other resisting the demand and claiming restitution. What questions do they thus raise for adjudication? First, whether the order in council was consistent with or repugnant to the law of nations? Next, whether the seizure was made within the terms of the order? The first of these questions is to the full as material as the second, because the court must decide according to the law of nations and distribute equal justice between the government of the country where it happens to sit and the governments or subjects of foreign states, and the order being in truth a mere act of one of the two governments, its legality is a question for the court.

Such is the general doctrine, we apprehend, on this subject, but it is laid down so much more clearly and forcibly by the celebrated judge to whose opinions we have so often referred that we must be excused for calling in his justly revered authority to our support. We allude to his beautiful judgment in the famous case of the Swedish convoy (*The Maria, Paulsen*, June 11, 1799).

Later the reviewer says (p. 315):

How, then, can the court be said to administer the unwritten law of nations between contending states if it allows that one government, within whose territories it "locally has its seat," to make alterations on that law at any moment of time? And by what stretch of ingenuity can we reconcile the position that the court treats the English Government and foreign claimants alike, determining the cause exactly as it would if sitting in the claimant's country, with the new position that the English Government possesses legislative powers over the court, and that its orders are in the law of nations what statutes are in the body of municipal law? These are questions which, we believe, the combined skill and address of the whole doctors of either law may safely be defied to answer.

Again: What analogy is there between the proclamations of one belligerent as relating to points in the law of nations and the enactments of statute as regarding the common law of the land? Were there, indeed, any general council of civilized states—any congress such as that fancied in Henry IV's famous project for a perpetual peace, any amphyctyonic council for modern Europe—its decisions and edicts might bear to the established public law the same relation that statutes have to the municipal code, because they would be the enactments of a common head, binding

on and acknowledged by the whole body. But the edicts of one state in questions between that state and foreign powers, or between that state and the subjects of foreign powers, or between those who stand in the place of that state and foreign governments or individuals, much more nearly resemble the acts of a party to the cause than the enactments of the law by which both parties are bound to abide.

Mark the consequences of such loose doctrines—such feeble analogies. They resolve themselves into an immediate denial that any such thing as the law of nations exists, or that contending parties have any common court to which all may resort for justice. There may be a court for French captors in France and for English captors in England. To these tribunals such parties may respectively appeal in safety, for they derive their rights from edicts issued by the Governments of the two countries severally; and those edicts are good law in the prize courts of each. But, for the American claimant, there is no law by which he may be redressed—no court to which he may resort. The edicts of his Government are listened to in neither the French nor the English tribunals; and he is a prey to the orders of each belligerent in succession. Perhaps it may be thought quite a sufficient hardship, without this aggravation, that even under the old and pure system laid down in 1798 and 1799 the neutral was forced to receive his sentence in a foreign court, always in the courts of the captor's country. But this undoubted rule of law, tempered by the just principles with which it was accompanied, appeared safe and harmless. For, though the court sat locally in the belligerent country, it disclaimed all allegiance to its government, and professed to decide exactly as it would have done sitting in the neutral territory. How is it now, when the court, sitting as before, has made so large a stride in allegiance as to profess an implicit obedience to the orders of the belligerent government within whose dominions it acts?

That a government should issue edicts repugnant to the law of nations may be a supposition unwillingly admitted, but it is one not contrary to the fact, for all governments have done so, and England among the rest, according to the learned judge's own statement. Neither will it avail to say that to inquire into the probable conduct of the prize courts in such circumstances is to favor a supposition, which can not be entertained "*without extreme indecency*," nor to compare this with an inquiry into the probable conduct of municipal courts in the event of a statute being passed repugnant to the principles of municipal law. The cases are quite dissimilar. The line of conduct for municipal courts in such an emergency is clear. No one ever doubted that they must obey the law. The old law is abrogated and they can only look to the new. But the courts of prize are to administer a law which can not, according to Sir William Scott (and if we err it is under the shelter of a grave authority), be altered by the practice of one nation, unless it be acquiesced in by the rest for a course of years; for he has laid down that the law, with which they are conversant, is to be gathered from general principles, as exemplified in the constant and common usage of all nations.

Perhaps it may bring the present case somewhat nearer the feelings of the reader if he figures to himself a war between America and France in which England is neutral. At first the English traders engross all the commerce which each belligerent sacrifices to his quarrel with his adversary. Speedily the two belligerents become jealous of England and endeavor to draw her into their contest. They issue decrees against each other nominally, but in effect bearing hard on the English trade, and English vessels are carried by scores into the ports of America and of France. Here they appeal to the law of nations, but are told, at Paris, that this law admits of modifications, and that the French courts must be bound by the decrees of the Tuileries; at New York, that American courts take the law of nations from Washington; and in both tribunals that it is impossible, "*without extreme indecency*," to suppose the case of any public act of State being done which shall be an infringement on the law of nations. The argument may be long and its windings intricate and subtle, but

the result is short, plain, and savoring of matter of fact, rather than matter of law. All the English vessels carried into either country would be condemned as good and lawful prize to the captors.

Let us not inquire how short a time the spirit of *our* nation would endure such a state of *public law*, and how speedily the supposed case would cease to apply by our flag ceasing to be neutral; but let us, on this account, learn to have some patience with a free and powerful people, quite independent of us, when we find them somewhat sore under the application of these new doctrines—these recent innovations on Sir William Scott's sound principles of law, and let us the more steadily bear in mind that great judge's remark on another part of the subject: "If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized States and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of States and of the lives and safeties of innocent individuals."

In the *Edinburgh Review* for January, 1862, volume 115, page 261, is the following:

The first rumor of war brings back the old controversies, and reopens the old authorities. In the interval but little progress has been made in the science of our jurists, and we find them recurring to practices and pretensions, sanctioned perhaps by the usages of war fifty years ago, but extremely inconsistent with the milder manners, the more extended intercourse, and the more liberal policy of modern times. Whatever respect may be due to the dignified and graceful language in which Lord Stowell pronounced his decisions, they can not plead any exemption from the stricter scrutiny of facts and the more equitable construction of principles which ought to mark the progress of knowledge and civilization. Lord Stowell conceived this country to be engaged in a revolutionary contest, because we had the misfortune to be at war with a revolutionary government. The landmarks of former times and the stipulations of more recent treaties were swept away by the torrent; but we are bold enough to assert that it is not for the interest or the honor of this country to attempt at this day to apply the extreme, and often unjustifiable rules, which may boast Lord Stowell's authority.

We would remark, without attempting to go deeply into the sources of international law, which we have endeavored to examine on a recent occasion, that as the law of nations can never be brought within the scope of the commands of a sovereign to a subject it differs in its essence from positive law. It is in fact consuetudinary—the result of the public convenience of mankind, and of those rules of morality which prevail for the general advantage among civilized states. Its provisions are not arbitrary or despotic, but conventional and reciprocal. Its sanctions lie in the decrees of courts of competent jurisdiction, administering justice in the face of the world; but the only penalty for a breach of its rules is the last resort of war.

(See also 3 Whart. Int. Law Dig., sec. 329a, where the *Edinburgh Review* articles are copied.)

Sir Travers Twiss, at the Antwerp Conference in 1877, in an article on the "Doctrine of Continuous Voyages," made a statement as follows:

It is a noteworthy fact, and it has been remarked upon as such in a report presented by one of the most eminent of American jurists to his own Government in 1866, "that whilst the political department of the American Government," to use the

words of his report, "was engaged in the early part of the present century in combating the overstrained constructions of the laws of maritime war set up by the courts and the publicists of England, not a few of the most exceptionable of those constructions were at the same time being transported one by one into the jurisprudence of the United States by the judicial department of its Government, with a prevailing tendency to exaggerate the rights of prize in the interests of the captors." [Opinion of Caleb Cushing to Secretary McCulloch, April 11, 1866.] There is an old saying that those who live in glass houses will do well not to cast stones at their neighbors, and it would ill become an English jurist not to admit that the prize tribunals of the United States had ample justification in the early part of the present century in reciprocating the rigorous rules which Lord Stowell applied to the trade of neutrals during the wars of the French revolution, and which were traditions from the wars of the previous century. But there are civilizing influences at work in the present century which were unknown in earlier days, and a certain equity has found its way into the proceedings of the English prize courts, which it is to the honor of the late Lord Kingsdown to have initiated as president of the appeal court of the English privy council during the Crimean war, and of which the spirit, it may be hoped, will be contagious with our brethren on the other side of the Atlantic.

Halleck's International Law, volume 1, page 58:

SEC. 22. According to the present law and practice of nations, the seat of judicial authority of *prize courts* is located in the belligerent country, and they are dependent, in a measure, upon the laws and institutions of the particular States by which they are established. In this respect they are *ex parte* tribunals. But the subjects of their adjudication are, without distinction, matters relating to the citizens and property of their own States, of neutrals, and of the belligerent country; and the law itself, by which their decisions should be governed, has no locality, and it is the duty of such a court to determine questions which come before it exactly as it would determine them by sitting in the neutral or belligerent country, the rights of whose citizens are to be adjudicated upon. In theory, therefore, such courts are regarded as international tribunals. But the practice has not at all times corresponded with this theory, and on this account it is necessary to rigidly investigate the principles upon which these adjudications are founded and the reasonings by which they are supported. With this caution in their use, the books of admiralty reports may become an instructive source of information respecting the practical rules of international law. It is also necessary to continually bear in mind the distinction between cases decided upon local law and institutions and those decided upon general principles which should govern the intercourse of independent States. Moreover, in maritime States, a court will feel, though perhaps unconsciously, the influence of a national bias in favor of the captor.

CASES INVOLVING THE LIABILITY OF THE UNITED STATES UNDER ARTICLE VII OF THE TREATY OF PEACE CONCLUDED BETWEEN THE UNITED STATES AND SPAIN ON DECEMBER 10, 1898, FOR PROPERTY LOSSES CAUSED BY THE SPANISH TROOPS AND BY THE INSURGENTS IN THE LATE INSURRECTION IN CUBA.

DISSENTING OPINION OF COMMISSIONER MAURY.

These cases have been before us on demurrer, and have been elaborately and learnedly discussed, both orally and in the briefs, and the conclusions reached by a majority of the Commission are embodied in certain propositions of law that are the standards by which the demurrers have been tested and disposed of.

These propositions are as follows:

1. Under Article VII of the treaty of Paris the United States assumed the payment of all claims of her own citizens for which Spain would have been liable according to the principles of international law. It follows, therefore, that the sole question before this Commission is that of the primary liability of Spain, which is not in any way enlarged by the agreement of the United States to adjudicate and pay such claims.

2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense which exempted the parent government from liability to foreigners for the acts of the insurgents.

3. But where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents.

4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed, from the first, beyond the control of Spain and so continued until such intervention and war took place.

If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due diligence might have prevented the damages done, Spain will be held liable in that case.

5. As war between Spain and the insurgents existed in a material sense, although not a state of war in the international sense, Spain was entitled to adopt such war measures for the recovery of her authority as are sanctioned by the rules and usages of international warfare. If, however, it be alleged and proved in any particular case that the acts of the Spanish authorities or soldiers were contrary to such rules and usages Spain will be held liable in that case.

6. As this Commission has been directed by Congress to ascertain and apply the principles of international law in the adjudication of claims of neutral foreigners for injuries to their persons and property caused by a parent state while engaged in subduing by war an insurrection which had passed beyond its control, it can not fail, in determining what are and what are not legitimate war measures, to impose upon

the parent state such limitations as the consensus of nations at the present day recognizes as restricting the exercise of the right to remove all the inhabitants of a designated territory and concentrate them in towns and military camps and to commit to decay and ruin the abandoned real and personal property or destroy such property and devastate such region.

7. Adopting therefore a wide and liberal interpretation of the principle that the destruction of property in war where no military end is served is illegitimate, and that there must be cases in which devastation is not permitted, it should be said that whenever reconcentration, destruction, or devastation is resorted to as a means of suppressing an insurrection beyond control the parent state is bound to give the property of neutral foreigners such reasonable protection as the particular circumstances of each case will permit. It must abstain from any unnecessary and wanton destruction of their property by its responsible military officers. When such neutral foreigners are included in the removal or concentration of inhabitants, the government so removing or concentrating them must provide for them food and shelter, guard them from sickness and death, and protect them from cruelty and hardship to the extent which the military exigency will permit. And finally, as to both property and persons, it may be stated that the parent State is bound to prevent any discrimination in the execution of concentration and devastation orders against any class of neutral foreigners in favor of any other class or in favor of its own citizens.

8. Subject to the foregoing limitations and restrictions it is undoubtedly the general rule of international law that concentration and devastation are legitimate war measures. To that rule aliens as well as subjects must submit and suffer the fortunes of war. The property of alien residents, like that of natives of the country, when "in the track of war," is subject to war's casualties, and whatever in front of the advancing forces either impedes them or might give them aid when appropriated, or if left unmolested in their rear might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents; and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting.

If in any particular case before this Commission it is averred and proved that Spain has not fulfilled her obligations as above defined she will be held liable in that case.

9. It is the opinion of the Commission that the treaty of 1795 and the protocol of 1877 were in full force and effect during the insurrection in Cuba, and they will be applied in deciding cases properly falling within their provisions.

10. As to the first clause of article 7 of the said treaty, wherein it is agreed that the subjects and citizens of each nation, their vessels, or effects shall not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever, the Commission holds that whether or not the clause was originally intended to embrace real estate and personal property on land as well as vessels and their cargoes, the same has been so construed by the United States, and this construction has been concurred in by Spain; and therefore the Commission will adhere to such construction in making its decisions.

11. But neither this particular clause nor any other provision of the treaty of 1795 will be so applied as to render either nation, while endeavoring to suppress an insurrection which has gone beyond its control, liable for damages done to the persons or property of the citizens of the other nation when found in the track of war or for damages resulting from military movements unless the same were unnecessarily and wantonly inflicted.

I regret that I have been able to yield only a very limited and qualified assent to the doctrines enunciated in these propositions, and I now propose to give more fully the reasons which have impelled me to differ from my brethren who concur in them.

By Article VII of the treaty of peace the United States, after relinquishing to Spain "all claims for indemnity, national and individual, of every kind," that arose "since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty," agreed "to adjudicate and settle the claims of its citizens against Spain" thereby relinquished, and which Spain herself satisfied in bulk by Articles II and III of the treaty ceding "the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies" and Guam and the Philippine Archipelago.

The cases before us present the broad question: What claims of our citizens against Spain for injuries to their property in Cuba, during the insurrection there, did the United States agree "to adjudicate and settle" by the treaty of peace concluded with Spain on December 10, 1898?

In interpreting this treaty, we must keep constantly in mind the vital fact that its exactions are the last expressions of the violence of war, and that, unlike agreements generally, they are none the less binding because they have the free assent of the victor only who dictated them; for, as Burlamaqui says, echoing the general voice, "treaties of peace are to be faithfully observed, and can not be disannulled, under the pretext of an unjust constraint." To the same effect is Vattel, who says: "We can not claim a dispensation from the observance of the treaty of peace by alleging that it was extorted from us by fear or wrested from us by force." (Book IV, sec. 37.)^a

^a The whole paragraph in which the language quoted occurs is as follows:

"We can not claim a dispensation from the observance of a treaty of peace by alleging that it was extorted from us by fear or wrested from us by force. In the first place, were this plea admitted it would destroy from the very foundations all the security of treaties of peace, for there are few treaties of that kind which might not be made to afford such a pretext as a cloak for the faithless violation of them. To authorize such an evasion would be a direct attack on the common safety and welfare of nations. The maxim would be detestable for the same reasons which have universally established the sacredness of treaties (Book II, § 220). Besides, it would generally be disgraceful and ridiculous to advance such a plea. At the present day it seldom happens that either of the belligerent parties perseveres to the last extremity before he will consent to a peace. Though a nation may have lost several battles, she can still defend herself; as long as she has men and arms remaining she is not destitute of all resource. If she thinks fit by a disadvantageous treaty to procure a necessary peace, if by great sacrifices she delivers herself from imminent danger or total ruin, the residue which remains in her possession is still an advantage for which she is indebted to the peace. It was her own free choice to prefer a certain and immediate loss, but of limited extent, to an evil of a more dreadful nature, which, though yet at some distance, she had but too great reason to apprehend."

To this may be added the following from Mr. Dana's edition of Wheaton:

"It is a general and necessary principle that duress can not be set up against the obligation of a treaty of peace. Coercion and duress are of the essence and idea of war; and it is the understanding upon which nations go to war that each appeals to the chances of successful coercion." (Note to § 551.)

When Brennus cried, "Woe to the vanquished!" (*Væ victis!*) and, suiting the action to the words, threw his sword into the balance, he gave a token to the ages to come of what is *practically* the right of might in war. And, evidently, this right of might was in the minds of our Commissioners at Paris when they brushed aside Spain's proposal to arbitrate a certain point with the remark, that "arbitration precedes war, to avoid its horrors; *it does not come after the trial by battle to enable either party to escape its consequences.*" (Treaty Doc., p. 208.)

Our Government, protesting all the time against the barbarities and cruelties of both parties to the contest in Cuba, kept Spain fully informed of the nature of the claims of our citizens for losses and injuries of every description resulting from that contest, and, therefore, when Spain gave up Porto Rico and with it "the very last memory of a glorious past," and submitted "*to the law of the victor, however harsh it may be,*" by ceding the Philippines (I give her own words in both instances) she was forced to acknowledge and ratify these very claims, many of which had been so frequently pressed upon her attention, and to furnish the United States with the means for their satisfaction or suffer the dreadful alternative of a return to active hostilities without adequate power of resistance left.

Plainly then, as it seems to me, it is no province of this Commission to inquire into the validity of these claims of our citizens, for they are all made valid in point of law by the treaty. Their validity is, in truth, a thing adjudged between the parties, never to be disturbed again, and the true province of this Commission is to identify them and to ascertain whether, and to what extent, they have existence in point of fact.

The question then is not what claims Spain, aside from the compulsion of the treaty, thought she was liable for, or what this Commission, looking at the subject with, as I shall show, wholly inadequate means of information of its own, thinks she was liable for, or what international law declares she was liable for, but the simple question for solution here is: *What claims the United States had decided for itself that Spain was liable for, and then, with sword still in hand, forced Spain to settle by cessions of territory.* This is the whole question. It follows, therefore, if I am correct, that there is a fundamental error in the ruling of the majority "that the sole question before this Commission is that of the primary liability of Spain, which is not in any way enlarged by the agreement of the United States to adjudicate and pay such claims."

The United States, with satisfaction thus delivered into its hands by Spain, is a trustee of that satisfaction for the holders of the claims which it thus forced Spain to admit and settle, and its representatives should not be permitted now to defeat them before this Commission as claims against itself as trustee, on grounds that are wholly inconsistent

with those taken by it when Spain was a suppliant for peace on any terms—grounds that, in my judgment, go far toward making mockery of Article VII of the treaty and of the fifth amendment of the Constitution of the United States prohibiting the taking of private property for public use without “*just compensation*.”

Coming now to the identification of these claims for indemnity, which, as I have said, is the main question for adjudication by the Commission, it is to be remarked that Article VII and writings generally, however solemn, that fail to point out with sufficient clearness the subject-matter on which they were intended to operate, can not have effect without more or less reference to the facts and circumstances in which they originated, and which constitute their history, as it were. For instance, the Supreme Court looked into history for light on the question whether a case of disputed boundary between States was brought within the judicial power of the Constitution by the phrase “*controversies between two or more States*” (*Rhode Island v. Massachusetts*, 12 Pet., 657); and it did the same thing in another case for the purpose of settling the meaning of the expression “*bills of credit*” as used in a well known prohibitory clause of the Constitution (*Craig v. Missouri*, 4 Pet., 410). In still another case, the judgment of that court was largely controlled by the fact that the contemporary history of the Constitution tended strongly to show that the mere generality of the words of the judicial power, “*all cases in law and equity arising under this Constitution*,” could not have been intended to involve such a surrender of sovereignty on the part of the several States as to authorize a suit by a citizen against his own State claiming the protection of the Constitution without the consent of such State (*Hans v. Louisiana*, 134 U. S., 1). In *Shoemaker v. The United States* (147 U. S., 282) it was contended on the literal sense of a proviso in the Maryland act ceding territory for a seat of government for the United States that the power of eminent domain of the new government over such territory was subject to a serious qualification, but the court disposed of the point with the remark that “*the history of the transaction*” showed that the proviso was not intended to have that effect. By a similar process the Supreme Court deduced the meaning of the words “*held to service or labor*” in *Prigg v. Pennsylvania* (16 Peters, 539, 611); and of the word “*citizen*” in *Scott v. Sanford* (19 Howard, 393, 407); and of the words “*privileges and immunities*” and “*equal protection*,” as affecting citizens, in the *Slaughter-House Cases* (16 Wall., 36, 81); and of the words “*contrary to the Constitution of the United States*” in *Hawaii v. Mankichi* (190 U. S., 197, 209). The same extraneous assistance was necessary to enable the arbitrators at Geneva to fix the sense of the term “*Alabama claims*,” used in the well-known treaty between Great Britain and the United States.

In short, the instrument in each of these cases was applied to its subject-matter by looking into the surrounding facts precisely as is done in the case of an ordinary will devising all the testator's land, without further description, to a particular person.

In what better way, then, it may be asked, can this Commission put itself in the place of the United States so as to identify the claims which that Government forced Spain to admit and settle, than by looking at the conditions in Cuba out of which these claims arose in the light that Government viewed them at the time, as shown by its state papers, which, being within our official knowledge, we are free to consult in disposing of these demurrers.

In his message of April 11, 1898, recommending forcible intervention, President McKinley said, that from the beginning of the insurrection in Cuba, in February, 1895, there had been before our people the spectacle of "a fertile domain at our threshold ravaged by fire and sword." Indeed, the struggle between Spain and the insurgents seems to have started full grown in lawlessness, for when it was under a month old this Government was somewhat startled by the news that the steamer *Allianca*, carrying the United States mail and protected by our flag, had been fired at with solid shot and brought to by a Spanish gunboat on the high seas, some 6 miles from the Cuban coast, while peaceably making one of her usual voyages between New York and Colon. The incident passed off with Spain's disavowal and apology, but the disposition to trample on the rights of our citizens remained and marked the whole course of the struggle. Indeed, such was the animus of Spain that there was no surer way of infuriating the Spanish officer or the soldier in the ranks and provoking him to violence and brutality than a claim to protection under American papers.

As a consequence, our Government was kept busy sending protests and remonstrances to Spain, the details of which it is not necessary to go into.

In his first annual message after the insurrection broke out, dated December 2, 1895, President Cleveland speaks of "the cruelties which appear to especially characterize this sanguinary and fiercely conducted war," language which must have been provoked by dreadful conditions existing even then. It could not have been the language of exaggeration, as the President, by his neutrality proclamation and the energetic manner in which he was following it up, was showing every disposition to give Spain a fair chance to restore order in the island; and considering the excited state of the public mind in this country he would hardly have ventured to use language stronger than the actual facts warranted.

In his next annual message, of December 7, 1896, the President draws a still more deplorable picture of the state of things in Cuba. He says that with the exception of the large towns and their "imme-

diate suburbs," where Spain keeps up civil government "more or less imperfectly," all pretense that such government exists "has been practically abandoned;" in short, that, with the exception mentioned, "the country is given over to anarchy or is subject to the military occupation of one or the other party." What such "military occupation" meant appears afterwards, when he classifies the Spanish troops and the insurgents with the "bands of marauders" that followed in their wake, and "*now in the name of one party and now in the name of the other, as may best suit the occasion, harry the country at will and plunder its wretched inhabitants for their own advantage.*" But the horrors of the situation are, if possible, more completely presented when the President states that the Spanish Government is apparently acting upon the same theory as the insurgents, "*namely, that the exigencies of the contest require the wholesale annihilation of property, that it may not prove of use and advantage to the enemy.*"

It is not difficult to appreciate the President's perplexity between the effort to avoid war with Spain and the desire to put an end to the conditions which were rapidly causing "the utter ruin of an adjoining country, by nature one of the most fertile and charming on the globe," and, with it, from \$30,000,000 to \$50,000,000 of American capital invested "in plantations and in railroad, mining, and other business enterprises;" investments made, as Secretary Olney says, "on the assumed assurance of respect for law and treaty rights." The Secretary might have said that these investments were made on the express invitation of Spain, contained in her constitution, which declared that "foreigners may unrestrictedly establish themselves in Spanish territory and exercise therein their industry or devote themselves to any profession for the discharge of which the laws do not require diplomas of proficiency issued by the Spanish authorities."

But instead of this assurance having been made good by Spain, the Secretary tells us in his report of even date with the message, and referred to therein for more particular information, that the estates of our citizens "have been desolated and crops destroyed *by the insurgents and Spaniards alike*;" and that where "not actually ravaged, operations have been compulsorily suspended owing to the warning served by the revolutionists or the withdrawal of protection by the Spanish authorities, often accompanied by a similar prohibition against continuing work thereon or by forbidding communication and residence, thus entailing enforced abandonment of the premises. Provisions and stock have been seized by either force for military use without compensation. Dwellings have been pillaged." (For. Rel., 1896, p. LXXXV.)

After referring to the "numerous claims on these several accounts that have been filed," the Secretary throws additional light on the scene of turbulence and lawlessness he has been describing by the

remark that "in many instances the sufferers are known to abstain from formal claim or complaint for prudential reasons, lest worse should befall them at the hands of the insurgents and the Spaniards in turn, according as either may gain temporary control of their property." (Ibidem.)

According to the Secretary, the island was a scene of "arbitrary anarchy" "laid waste" from end to end "by the blind fury of the respective partisans," where "the principles of civilized warfare, according to the code made sacred by the universal acquiescence of nations, are only too often violated with impunity by irresponsible subordinates, acting at a distance from the central authority and able to shield themselves from just censure or punishment by false or falsified versions of the facts." (Ibidem, p. LXXXIV.)

The gravity of the situation thus depicted will be better understood by recalling the fact that on April 4, 1896, some eight months previous to the message and report just referred to, Secretary Olney, in a somewhat memorable letter to the Spanish minister, described *the very same conditions as then existing*. "Outside of the towns still under Spanish rule," says he, "anarchy, lawlessness, and terrorism are rampant." A vast area of the island, he tells us, is even then under the control of "roving bands of insurgents," who, "*making no discrimination between enemies and neutrals, destroy, wholesale, crops, factories, and machinery, to cripple the resources of Spain, on the one hand, and to benefit themselves, on the other, by driving into their ranks 'the laborers who are thus thrown out of employment.'*" "The result," he goes on to say, "is a systematic war upon the industries of the island and upon all the means by which they are carried on, and whereas the normal annual product of the island is valued at something like eighty or a hundred millions, its value for the present year is estimated by competent authority as not exceeding twenty millions."

Then comes the pregnant question: "What can a prudent man foresee as the outcome of existing conditions except the complete devastation of the island, the entire annihilation of its industries, and the absolute impoverishment of such of its inhabitants as are unwise or unfortunate enough not to seasonably escape from it?" (For. Rel., 1897, p. 542.)

When Congress assembled again, in December, 1897, President McKinley informed them, with satisfaction, in his first message that a new government, pledged to reform, had taken office in the mother country, with Sagasta as premier, and that its promises warranted the belief "that a hopeful change has supervened in the policy of Spain towards Cuba."

The recall of "the commander whose brutal orders inflamed the American mind and shocked the civilized world," and a modification of the "horrible order of concentration" in obedience to the demands

of humanity, were accepted by the President as an earnest that "the policy of cruel rapine and extermination that so long shocked the universal sentiment of humanity has been reversed," and "that the power of the Spanish armies" was thenceforth to be used "not to spread ruin and desolation, but to protect the resumption of peaceful agricultural pursuits and productive industries." But, as the sequel proved, that "policy of cruel rapine and extermination" was never to be reversed, and those armies of Spain were to continue "to spread ruin and desolation" so long as the island of Cuba remained under her control.

In the correspondence of the State Department, during the summer and autumn preceding this message, we find a sad picture of the results of General Weyler's concentration policy, and I pause for a moment to quote from the letter of the Secretary of State, dated June 26, 1897, to the Spanish minister, referring to that policy as one "of devastation and interference with the most elementary rights of human existence."

"Against these phases of the conflict," he says, "against this deliberate infliction of suffering on innocent noncombatants, against such resort to instrumentalities condemned by the voice of humane civilization, *against the cruel employment of fire and famine to accomplish by uncertain indirection what the military arm seems powerless to directly accomplish*, the President is constrained to protest in the name of the American people and in the name of common humanity. The inclusion of a thousand or more of our own citizens among the victims of this policy, the wanton destruction of the legitimate investments of Americans to the amount of millions of dollars, and the stoppage of avenues of normal trade—all these give the President the right of specific remonstrance; but in the just fulfillment of his duty he can not limit himself to these formal grounds of complaint. He is bound by the higher obligations of his representative office to protest against the uncivilized and inhumane conduct of the campaign in the island of Cuba. He conceives that he has a right to demand that a war, conducted almost within sight of our shores and grievously affecting American citizens and their interests throughout the length and breadth of the land, shall at least be conducted according to the military codes of civilization." (For. Rel. 1897, pp. 507-508.)

At last these exasperating and critical relations between our country and Spain were brought to a head by President McKinley's message of April 11, 1898, in which he refers to "the policy of devastation and concentration" as having added to the "horrors" of the strife "a new and inhuman phase, happily unprecedented in the modern history of civilized Christian people." He speaks of the general desolation and destruction caused "by one or the other of the contending parties, and executed by all the powers at their disposal," and recommends inter-

vention by force in order "to put an end to the barbarities, bloodshed, starvation, and horrible miseries existing there," and afford our citizens "that protection and indemnity for life and property which no government there can or will afford," and to relieve the "commerce, trade, and business of our people," and stop "the wanton destruction of property and devastation of the island," and, with it, a "condition of affairs" which is a "constant menace to our peace" and compels us "to keep on a semiwar footing with a nation with which we are at peace."

After this terrible arraignment of Spain by our Executive, from the beginning of the insurrection down, for wanton and criminal aggressions on the rights of our citizens in Cuba, would it not be unreasonable to doubt that when the peace negotiations were opened at Paris it was the fixed determination of our Government to *force* Spain to provide by cession of territory, the only means of satisfaction she had, for the indemnity of our innocent citizens for all the losses they had sustained from the agencies of destruction which had been let loose on them by the insurrection, from whatever quarter they might have proceeded?

It is to be remembered that our Government, through President Cleveland, in his message of December 7, 1896, boldly announced the opinion that the existing revolt against Spain was caused by her failure to redress "conceded grievances" which had been "recognized by the Queen Regent and by the Cortes, voiced by the most patriotic and enlightened of Spanish statesmen, without regard to party, and demonstrated by reforms proposed by the executive and approved by the legislative branch of the Spanish Government." Spain was, therefore, the primary cause of the revolt, and the only responsible party to be looked to, for both Governments were agreed that the insurgents were as irresponsible as a mob, with no government that could be appealed to for any purpose. When, therefore, Spain was prolonging the horrors of the struggle and abusing the patience and leniency of our Government by protestations of ability to pacify the island, in order to stave off the inevitable day of intervention, she was bound to know that the time was certain to come when we would exact from her the uttermost farthing for the losses and misery she was causing our citizens by turning a deaf ear to the repeated offers of peaceable mediation from our Government.

On the other hand, it would be a most undeserved reflection on our Government to say that while it was pursuing a policy of leniency and peace, by deferring to the sensitiveness, not to say resentment, Spain always showed at the bare suggestion of interference on our part as peacemaker, and was thereby permitting the sufferings of our people in Cuba to continue, it had not, at the same time, formed the determination to compel Spain to make good to them, ultimately, *all the*

losses they should suffer from the hopeless struggle she persisted in carrying on.

If, under the circumstances, it had become known that the negotiations at Paris were being conducted by our Commissioners on any such basis as that Spain should be held only to a qualified liability for injuries to the persons and property of our citizens by her own authorities or by the insurgents, as is the opinion of a majority of the Commission, and, consequently, that a large part of those injuries would go unredressed, it is no exaggeration to say that a current of indignant protest would have set in which would have compelled the abandonment of such a policy.

Spain having, in the opinion of our Government, engaged in the "wholesale annihilation" of American and other property without regard to the rules of civilized warfare, had no right to expect that, when the day of reckoning came, her responsibility would be weighed in golden scales, under any circumstances, much less at the hands of a victorious enemy, whose magnanimity she had sorely tried. Her share in the work of devastation being, in the nature of things, hardly distinguishable from that of the other pillagers and marauders who had been harrying the island, what right had she, the primary cause of the uprising, to complain of our compelling her, under the stress of arms, to make reparation in the treaty of peace for all the losses our citizens had sustained?

Our Department of State was constantly bringing to the attention of Spain claims of our citizens for injuries committed in Cuba by the Spanish troops and by the insurgents, and resulting from the reconcentration measures; and I have now before me two letters of Secretary Olney embracing some thirty such cases, dated, respectively, May 5, 1896, and June 5, 1896, which were printed by the Government for the use of the Commission. Each letter concludes as follows:

"The facts set forth as regards these claims indicate that the *rights granted by international law and by treaty to citizens of the United States residing in Cuba have not been observed by the Spanish authorities in that island*. It is hoped that the Spanish Government will give them as early consideration as is practicable, and take measures to prevent *any further infraction of the rights of our citizens who may be within its jurisdiction*." (Italics my own.)

In the face of these repeated notifications, Spain, whether from conviction or because she was "the feeblener of the contracting parties, who was compelled to receive what the stronger dictated," as she was described to be by her own Commissioners, *never once, during the peace negotiations, made, or suggested even, any distinction between these several classes of claims, but admitted her liability in terms general and comprehensive enough to cover them all, ceding territory to meet it*.

For example, among the articles Spain proposed for the treaty of peace was one providing for the cession to the United States of Porto Rico and other islands, "as compensation for the losses and expenses occasioned the United States by the war, and for the claims of its citizens *by reason of the injuries and damages they may have suffered in their persons and property during the last insurrection in Cuba.*" (Treaty Doc., p. 58.)

At another time, the Spanish Commissioners refer to the cession of Porto Rico and the other islands as made "in the way of indemnity for the expenses of the war, and of the *damages which they* [the United States] *said American citizens had suffered during the colonial insurrection.*" (Treaty Doc., p. 83.)

Again, we find the president of the Spanish Commission inquiring if our Commissioners would object to its being stated in the treaty that the proposed cession of territory "was made as indemnity for the expenses of the war and *the injuries suffered during it by the American citizens.*" (Treaty doc., p. 95.)

The view that Spain, submitting to what she called "the law of the victor, however harsh it may be," intended to provide indemnity for claims of our citizens for losses and injuries suffered during the late insurrection in Cuba, whether inflicted by her own authorities or by the insurgents, is rendered still more probable by the contrast between her utterances during these negotiations and the resulting treaty and the Memorandum Agreement of February 11, 1871, establishing a mixed commission for the settlement of claims of our citizens for wrongs and injuries committed against them "*by the authorities of Spain in the island of Cuba*" since the outbreak of the insurrection of 1868, which was then going on. This agreement, it will be perceived, withheld from the mixed commission wrongs and injuries committed by the then insurrectionary forces or authorities. But, as we have seen, no such restriction is imposed by the treaty of peace or hinted at in the negotiations that led thereto. Spain's silence in this particular is significant.

But, before turning away from the proceedings at Paris, I must refer to the very significant language of our Commissioners in one of their elaborate replies, where they speak of the magnanimity of our Government in waiving the right to demand money and in being content with a cession of territory "for the many millions spent, and *the sufferings, privations, and losses endured by its people.*" (Treaty Doc., p. 107.) In my judgment, this sweeping language would hardly have been employed if there had been any recognized limitation on the liability of Spain for the injuries and losses of our citizens in Cuba.

It is hardly reasonable to suppose that Secretary Day, in his letter of July 30, 1898, conveying to the Duke of Almodovar the President's

reply to the overture for peace contained in his letter of July 22, 1898, had reference to technical claims when he said that the President could not be insensible "to the claims of our citizens for injuries to their persons and property during the late insurrection in Cuba." On the contrary, we should presume that he used the word "claims" in a very comprehensive sense, having in mind the sufferings and persecutions to which our citizens had been subjected equally by the Spanish authorities and the insurgents in that "fertile territory wasted by fire and sword and given over to desolation and famine" to which he had previously referred in the same letter. Of this we may, at least, be reasonably sure; that the restrictions and distinctions as to the liability of Spain contained in the propositions laid down by the majority were not present to the writer's mind. It would, indeed, seem quite like a reflection on the President and his able Secretary of State to suppose that, with the power of dictating terms in their own hands, they would have been willing to throw away the opportunity to secure the most comprehensive indemnity for our citizens.

Taking together this contemporaneous interpretation of the treaty and the other considerations above advanced, we have what seems to be a demonstration that Spain admitted her liability for all the injuries and losses our people had suffered in Cuba and ceded her insular possessions to meet that liability; and that the United States holds that territory in trust for our injured citizens, having accepted it from Spain for that purpose.

The United States, having thus demanded and received from Spain satisfaction for all claims of its citizens for injuries caused in any way by the insurrection in Cuba, and having released Spain from liability for these claims, should not be permitted to make defense against any of them on the ground that Spain was not bound by international law or by treaty to pay them. In law and morals, the United States is estopped to set up any such defense. Whatever Spain was forced to pay, this Government is bound to turn over as trustee until every sufferer has been compensated. In no other way can the justice of the treaty be met.

Indeed, the attitude in which the Government is placed by the positions taken in support of the demurrers is particularly painful in view of the letters of Secretary Olney above referred to, in which he characterizes cases belonging to each class of those covered by the demurrers as showing, on their face, violations by Spain of rights granted by international law or by treaty; and I am not aware that our Executive has ever changed the opinion thus advanced.

The view I have taken with regard to the attitude of the counsel of the Government in the cases under consideration is strongly supported by the decision of the Court of Claims in the cases of *Hubbell*

and others v. the United States (15 C. Cls. R., p. 546), which arose out of the destruction of the bark *Caldera* and her cargo, belonging to American citizens, by Chinese pirates.

As the result of the demand of our Government on China for indemnity for the claims in question the latter Government agreed by treaty to pay, and did pay, the United States the sum of \$750,000, in full settlement of all claims of American citizens up to date. It is sufficient for the present purpose to say that the cases got before the Court of Claims by authority of an act of Congress, as I desire merely to point out that when the court came to deal with the contention of the Government's counsel that the claimants had no claims at all against China under international law, it held that the position taken was untenable, because the validity of the claims had been already established by the decision of the executive, the proper department of the Government to pass on it, and was no longer an open question. I quote from the opinion the following pertinent and emphatic language:

“It can not be questioned that, in determining what claims should be paid out of that sum, it was the right of the United States to ascertain, in such way and through such instrumentality as they might see fit to prescribe and employ, whether any claim which had *not* been presented by the United States to the Chinese Government before the convention of 1858 was a claim for which, by international law, China was liable; but when *the President of the United States, before that convention was signed, had examined into claims*—as he did in the case of the *Caldera*—and had not only decided that they were just claims against China, but had ordered a peremptory demand to be made upon China for their settlement, *the point was settled, so far as the United States are concerned, that by international law they constituted a legitimate reclamation upon that country.* And it was so settled by the only department of the United States Government that had authority to settle it. And in our judgment *it is not for any judicial tribunal to assume to reverse that decision of the National Executive, and so put our Government in the unjustifiable and unenviable position before the world of having demanded money from China to pay certain claimants, and then denying them indemnity out of that money on the ground that, on principles of international law, they never had any claim whatever against China. It would be inconsistent with the plainest principles of national honor for our Government to have urged, in language so peremptory and with a promptness so conspicuous, demands which, as now claimed, were unsanctioned by international law.*” (p. 593.)

This decision was affirmed, on appeal, by a divided court; but no opinion was given according to the practice of the Supreme Court in such cases.

With Spain driven from the island by the land and naval forces of the United States because she was, in the judgment of the political departments of the government, Congress and the Executive, the primal cause of those “abhorrent conditions” which “for over three years” had “shocked the moral sense of the people of the United

States" and been "a disgrace to Christian civilization," how can this Commission, as a member of the judicial department, rejudge the action of the other two departments in a matter within their competency by denying Spain's responsibility for results flowing directly from those very conditions? In my judgment, the Constitution of the United States admits of no such anomaly, of no such contradiction. On the contrary, as I shall show further on, what the other departments have thus done and sealed with the blood and treasure of the country concludes absolutely the judicial department; in a word, it has become clothed with the sanctity of the thing adjudged, and must be accepted as final. The thing adjudged is accepted as truth, *res judicata pro veritate accipitur*, or, as Mr. Justice Campbell puts it stronger still, in *Jeter v. Hewitt et al.* (22 How., 364), the thing adjudged renders white that which is black and straight that which is crooked, *res judicata facit ex curvo rectum, ex albo nigrum*.

But if we suppose, for the sake of argument, that this Commission has a free hand, and is at liberty to hold that the liability of the United States under Article VII of the treaty of peace is to "adjudicate and settle" only such claims of our citizens as Spain was responsible for under the law of nations, I apprehend the result must be the same under that code.

In my judgment, there is no middle ground between holding Spain accountable to our citizens for all the consequences of the "abhorrent conditions" in Cuba and exempting her from any responsibility whatever; nor can I doubt, or even hesitate, upon the subject of Spain's full responsibility when I consider the part she took in producing those "abhorrent conditions," as shown by the messages and other utterances of the Executive Department of our Government, from which I have already freely quoted.

Some idea may be formed of the degradation to which the Spaniards and the insurgents had sunk when we recall that the bands of marauders that harried the country actually derived some sanction or countenance for their nefarious work by operating, as Secretary Olney tells us, "*now in the name of one party and now in the name of the other, as may best suit the occasion.*" Might I not stop here and leave the reader to complete the picture?

In vain did this Government protest, again and again, in the name of our suffering citizens and of humanity, against Spain's disregard of the rules of civilized warfare, against her wanton cruelties to our citizens, and against the devastation and pillaging of their estates by her captains and their followers, whose ferocity, as I have said, seemed to rise to an uncontrollable pitch at a demand for protection on the ground of American citizenship, as shown in one instance where Secretary Olney remarks, in a note to our minister at Madrid, that the only provocation which appeared to have been given for the shocking cruel-

ties inflicted by a Spanish general was that the victim was "a citizen of the United States, and that he presented papers bearing the signature and seal of the United States consul-general in Cuba, which were given him to insure his protection from harm by the Spanish authorities in Cuba."

In his message of December 6, 1897, President McKinley speaks of the "brutal orders" of reconcentration that had "inflamed the American mind and shocked the civilized world" as "*not civilized warfare*" but "*extermination*." He characterized the policy on which Spain had been carrying on the struggle as "the policy of cruel rapine and extermination that so long shocked the universal sentiment of humanity," and said that the power of her army had been used "to spread ruin and desolation," and that "*the civilized code of war has been disregarded, no less so by the Spaniards than by the Cubans.*"

Language can not adequately describe the barbarities, the inhumanities that provoked this gentle, peace-loving President thus to characterize Spain's method of conducting the struggle.

It thus appears from the state papers of our own Government that when Spain should have been doing her best to protect our citizens she was laying waste their estates and stripping them of their movable property, and that when she should have been maintaining government she was engaged in producing anarchy. Her officers and soldiers having thus laid aside the honor and chivalry that belong to the military character and descended to the level of common robbers and assassins, it is pertinent to ask if the United States can now claim, in the name of Spain, the protection and indulgence which the law of nations reserves for those only who conform to its requirements and do not trample them under foot.

To my apprehension, the positions taken by the learned counsel for the Government are, for the most part, remote from the line of argument properly belonging to the discussion of these demurrers; as, for example, the contention that Spain, whose perfidy and tyranny after the peace of Zanjón caused the insurrection and who had deliberately chosen the part of lawlessness and disorder and been expelled from the island as the primal cause of the "abhorrent conditions" there, was nevertheless entitled to be sheltered under the so-called *doctrine* of "beyond control," as though she had performed her whole duty under the law of nations; and that other contention, equally untenable, that the military of Spain, stained with every imaginable crime, should be treated with the same consideration as if they had been engaged in civilized warfare.

Although I am by no means prepared to concede as a principle of international law that when a revolt attains such a proportion as to be beyond the control of the titular government the latter is, *ipso facto*, discharged from liability to citizens of other countries for acts com-

mitted by insurgents who have no recognized *status* as belligerents, I am satisfied that it must be a necessary condition to a claim of exemption of this kind that the government making it should appear to have acted in good faith and to have put forth its best efforts to afford the protection to such citizens which every civilized nation is expected to furnish. Under no circumstances, therefore, was such a plea open to Spain, who, so far from acting in good faith, treated our citizens with barbarity and cruelty and made little or no effort to protect them from similar treatment at the hands of the insurgents and of the other marauders who, we are told, harried the land, now in the name of one party and now in the name of the other, as occasion seemed to require.

In my judgment, a government that deliberately causes anarchy and sets an example of lawlessness itself in time of rebellion against its authority is entitled to no consideration whatever from other governments whose citizens have suffered from such conditions.

Spain, having thus turned the divine power of government into the channels of anarchy and crime and become *hostis humani generis*, the United States should not be allowed now, in her name, any immunity from responsibility under the law of nations.

The allowance of such immunity to the United States under the rulings of the Commission also violates the principle that a wrongdoer can not qualify his own wrong and so restrict his responsibility within limits prescribed by himself. It seems to me to make light of Spain's crime against society to confine her liability to the particular instances in which the claimants may be able to prove that the Spanish authorities inflicted the damage complained of in violation of the rules of war, and to lose sight of the far-spreading influence of her example of lawlessness. Having sown the wind she should reap the whirlwind.

But the so-called principle of "beyond control" can not be invoked in the name of Spain as a defense against the claims for losses by the acts of the insurgents, for the further reason that Spain became bound contractually, by inevitable implication, to satisfy those claims, as I shall now endeavor to show.

As we have seen, President Cleveland in his message of December 7, 1896, declared the insurgent government to be a figment, existing on paper only. In a communication from the Spanish minister at Washington to Secretary Olney, dated June 4, 1896, the writer expresses the same opinion with the corollary therefrom that the insurgents could not "exercise the rights and fulfill the obligations that are incumbent on all the members of the family of nations." (For. Rel., 1897, p. 545.)

Supposing now the insurgents to have broken away from Spanish control, and Spain to have become thereby freed from liability for their acts under the doctrine laid down by the Commission, the only recourse left the United States was to send an army to Cuba to give

our suffering citizens there the protection against the insurgents which Spain was unable to furnish; but, as we have seen, Spain was intolerant of any suggestion from this Government of mediation or of recognition of the insurgents as belligerents or of forcible intervention, protesting all the while that she was able to cope with and put down the resistance to her authority. Our Government yielded to these appeals until further indulgence would have been a crime against our suffering citizens in Cuba, when it took up arms and drove Spain from the island as the only way to save it from ruin.

It should be remembered that this indulgence and forbearance on the part of the United States meant a prolongation of the sufferings of our citizens in Cuba, and a large addition to the cost already incurred of enforcing our so-called neutrality act. It would, therefore, be most unreasonable to suppose that the United States would have been so indifferent to its interests, and so derelict to its unprotected citizens in Cuba as to concede so much to Spain with the expectation of no return whatever; for, as we have seen, both countries were agreed that the insurgents were wholly irresponsible. In the nature of things, Spain, on the other hand, could not have expected to enjoy the benefits of our indulgence, and, at the same time, escape liability to make good the losses we could have prevented but for yielding to her appeals and promises. *Qui sentit commodum, sentire debet et onus* is a principle grounded in natural law and, therefore, a part of the law of nations. Great as was the desire of the United States to avoid a rupture with Spain, it is not agreeable to reason to suppose that that government was quite ready to buy peace by entering into an arrangement analogous to what the Romans called *societas leonina*, where all the benefits are on one side and all the burdens on the other.

The indulgence of this Government to Spain went to the very limit of reason and magnanimity, and the acceptance of that indulgence necessitated the implication of Spain's acquiescence in the position of our Government at the time that nothing had occurred to affect the continuing responsibility of Spain for the havoc that was being made of American interests in Cuba.

These considerations, taken in connection with the immensely important fact that all the while this indulgence was going on our Government was continually bringing to Spain's attention claims of our citizens for damages caused by the insurgents, show a reciprocity of conduct between the two Governments from which natural justice readily deduces a contract on the part of the one benefited to provide the necessary indemnity for the one that suffered in order to produce that benefit—such a contract, indeed, as “reason and justice dictate, and which the law, therefore, presumes that every man undertakes to perform.” Thus the Commentator defines an implied contract (2 Comm., 443), and his definition holds good as well between States as

between individuals. If, indeed, as we are told, a quasi-contractual relation only may exist between States, it certainly follows that an implied contract may also exist between them. "*Entre États comme entre particuliers, des engagements se forment d'une manière analogue aux engagements conventionnels: quasi ex contractu.*" (*Principes du Droit Des Gens par Rivier, Tome 2, p. 41; Heffter, Droit International, Ed. 4, par Geffcken, § 100.*)

In the above discussion I have felt free to consult the State papers of the Executive Department shedding light on the general conditions in Cuba during the late insurrection; as being within our official knowledge. Indeed, I know of no other channel through which the Commission could be adequately informed on the subject, seeing that it is without any sufficient means of its own for that purpose. Its character of impartial arbiter, its position of absolute neutrality between opposing parties mean the absence of power to prosecute independent investigations into matters of fact for itself, and subject it to the necessity of deciding issues of that sort on such evidence as the parties to them may choose to furnish, *and where that evidence stops the Commission must also stop, however much it may desire to go further.* As the president of the Commission said in a recent official letter, our function "is only to decide cases when the evidence is duly presented." (To Sec. of State, May 28, 1903.) It was to this attitude of neutrality of the courts that Sir Frederick Pollock pointed, on a recent occasion, as one of the foundations of justice for which we are indebted to the common law.

Undoubtedly, some such vein of reflection prompted the following remarks in the case of *The Ambrose Light*:

Courts can not inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments, and recognize only what those departments recognize; and, in the absence of any recognition by them, *must regard the former legal conditions as unchanged.* (25 Fed. Rep., p. 412.)

The same doctrine is impressively stated in the following passage from the opinion of Chief Justice Marshall in *Rose v. Himeley* (4 Cr., 268, 272):

The colony of St. Domingo, originally belonging to France, had broken the bond which connected her with the parent state, had declared herself independent, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and St. Domingo. It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, *not to courts.* It is for

governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, *courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.*

According to these authorities, the Commission can take knowledge that a war *de facto* was going on in Cuba, but can not judicially know the political effects produced by such war, and so long as nothing to the contrary was declared by the political department of the Government, the old state of things must be considered to have remained unaltered; that is to say, we must presume that the sovereignty of Spain was intact, and, with it, all her responsibilities under the law of nations for the safety of the persons and property of alien residents in Cuba. What else could Chief Justice Marshall have meant, when he said, in the above passage, that the "*courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting*"?

He did not, be it observed, venture to intimate the "beyond control" doctrine, although Santo Domingo had declared herself an independent state, and had maintained the pretension by arms, contending that she should be treated by other nations as sovereign in fact and entitled to maintain the same intercourse with the world that is maintained by other belligerent nations.

But there is still another reason why the so-called "beyond control" doctrine can not be invoked in these cases, namely, that the Executive Department of our Government has repeatedly ignored the doctrine as a principle of international law.

In 1861 it did not occur to our minister to England, Mr. Adams, that there was any such doctrine in the international code when he took consolation from the fact that the recognition of belligerency accorded to the Confederate States by Great Britain "had released the Government of the United States from responsibility for any misdeeds of the rebels towards Great Britain."

In his "memorable message of December 7, 1875," President Grant gives as one of the reasons for not recognizing the Cubans as belligerents that such recognition "*would release the parent government from responsibility for acts done by the insurgents;*" language which is quoted and adopted by President McKinley in his message of December 6, 1897.

In the case of *The Three Friends* (166 U. S., p. 63) the Chief Justice states as one of the effects of recognition of belligerency, "the abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare."

Is there room for reasonable doubt, then, that this omission to mention, even, the so-called doctrine of "beyond control" in these official declarations amounts to a deliberate purpose to deny it any countenance from the United States as a principle of the law of nations?

If Spain was already released from reliability for acts of the insurgents by the magic of the "beyond control" doctrine, it was little less than solemn trifling for our Executive to allege as a ground against conceding recognition to the Cubans that such action would release Spain from liability to our citizens for their acts.

When, therefore, a tribunal authorized by this Government is in want of information as to a matter pertaining to our relations with another power it should look for light not so much to the evidence supplied by the parties in the case before it as to the files of the Executive, which is the Department that has exclusive charge under the Constitution of our relations with other nations. This Department, unlike the judicial, has a free hand in investigating occurrences in other lands and is provided with the best information attainable, as compared with which evidence of a similar import collected by the private parties to a litigation must too often prove inadequate and unsafe. Indeed, a tribunal that should act on that sort of evidence in disposing of a question entering into our relations with another power or set up to know *ex officio* the facts pertaining to such relations would be in danger of rendering a decision that would clash with some policy or action of the Executive or prove a source of more or less embarrassment to the Government; and the possibility of such a contradiction and disorder in government is, to my mind, an unanswerable argument that it is the duty of the judiciary to *follow* the Executive in all such matters, and not to attempt to strike out an independent course of its own. I agree with the remark of a celebrated jurist that "the soundness of any construction which would bring one organ of the Government into collision with another is to be suspected; for where collision occurs, it is evident the machine is working in a way the framers of it did not intend."

Now, applying this test to the matter in hand, it would seem clear that the adoption and enforcement by the Commission of the "beyond control" doctrine seriously trenches on the province of the Executive, for it has produced embarrassment by involving the United States in the inconsistency of having pressed upon the attention of the Government of Spain claims of our citizens for losses and injuries caused by the insurgents, as indicating "that the rights granted by international law and by treaty to the citizens of the United States residing in Cuba have not been observed by the Spanish authorities in that island" and of having compelled Spain to settle these and other claims by cessions of territory and of now refusing, with satisfaction in its hands, to recognize these claims as having any validity.

Indeed, this action of the Commission has a still more serious phase, for if it was the exercise of a valid jurisdiction it is binding on the United States, and might provoke Spain to complain of having been compelled to grant indemnity for what the United States now repudiates.

In rejecting the idea that such a relation of contradiction or of antagonism between the Judicial and Executive Departments of our Government was possible, the Supreme Court says in the case of *Williams v. The Suffolk Insurance Company* (13 Pet., 415): "No well-regulated government has ever sanctioned a principle so unwise and so destructive of national character."

It should be remembered, too, that the powers granted by the Constitution are distributed among three great Departments—the Legislative, the Executive, and the Judicial—each of which is supreme within the circle of its authority. On this supremacy depends the equilibrium of the Constitution, and, in a large measure, the safety of the Government. (*Sinking-Fund Cases*, 99 U. S., 700, 718.) From which it follows as a necessary corollary that whatever any Department does within its powers should be accepted by the other two as final and complete, except where the Constitution otherwise ordains.

It will not be disputed that the Constitution makes the Executive the eyes and ears of the Government to collect information as to public affairs in other lands, and clothes it with authority to shape the policy of the Government thereon. If now the information so collected is a sufficient basis for Executive action towards other powers, I do not comprehend why such evidence and the policy or action of the Executive framed thereon should not be sufficient for the purposes of the judiciary and of Congress also. And I can not but regard it as some corroboration of the view I am presenting, that Congress, with ample authority to institute independent investigations of its own, and with a mass of evidence before it already on Cuban affairs that had been collected by the Senate Foreign Relations Committee, chose to refer to the message of President McKinley of April 11, 1898, as authority for what is said as to the conditions in Cuba in the preamble of the joint resolution of April 20, 1898, virtually declaring war against Spain.

It is said, however, that the authorities cited at the bar in support of the principle that the judiciary must follow Executive action in matters pertaining to our foreign relations do not apply to the species of Executive action taken with reference to the public conditions in Cuba during the insurrection. But as it can not be denied that the action thus taken was appropriate, and within the competency of the Executive Department, the circumstance that it was taken on facts different from those in the authorities cited does not appear to have any validity as an argument against the application of the principle here, unless it is intended to deny the authority of precedent altogether in judicial matters, seeing that cases distinct in origin but identical in principle are never the same in their facts.

If now the United States was estopped in the *Caldera* cases to question the validity of claims of American citizens against China which had been held valid by the Executive Department of the Govern-

ment, I apprehend that the United States should be estopped here to set up exemptions from liability under the law of nations, in the name of Spain, in the face of the deliberate judgment of the Executive Department that Spain had habitually trampled the law of nations under foot during the late insurrection, which judgment was followed and confirmed by Congress in the declaration of war under which Spain was expelled from Cuba.

But whether the Commission is bound or not by the opinions of the Executive as to the conditions in Cuba and the responsibilities flowing therefrom, it would seem impossible to deny that the views of that department showing the state of mind of our Government at the time are of great, not to say controlling, assistance in enabling us to judge what claims were in contemplation when our Government was remonstrating with Spain for her barbarous and inhuman treatment of our citizens in Cuba and when the indemnity provided for in the treaty of peace was forced out of Spain by our Government as the alternative to a resumption of active hostilities.

But aside from international law, Spain was bound by treaty stipulations of unusual stringency to make reparation for certain property losses of our citizens in Cuba during the late insurrection.

By article 7 of the treaty of 1795 it was agreed "that the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatever."

This provision the United States has several times used as a curb on Spain for the protection of our citizens against the arbitrary seizure or detention of their property of every description, holding that "no exigency of war, no requirement of the public service" could be allowed to sanction or excuse any such seizure or detention.

It is true Spain sought, during the ten years' insurrection, to gain a freer hand by narrowing the operation of this embargo provision by interpretation, but the effort completely broke down before the determined resistance of the United States, Spain ending by accepting without reservation the meaning placed on the provision by our Government.

When, therefore, Spain and the United States came to an agreement, in 1871, to arbitrate the claims of our citizens for injuries inflicted by the authorities in Cuba, neither Government recognized any right in the arbitrators to pass upon the validity of embargoes, that question having been tacitly reserved for diplomatic action exclusively, thus leaving nothing open before the tribunal in embargo cases but the assessment of damages and proof of citizenship. In a word, the two Governments had agreed upon the true import of the embargo provision, and that matter had become *res judicata* by a tribunal, so to

speaking, having exclusive jurisdiction of the subject; I say exclusive jurisdiction, because I deem the expression warranted by an opinion of Mr. Justice Curtis, much commended in the *Head Money Cases* (112 U. S., 597, 598), where that eminent jurist held that a promise in a treaty addresses itself to the political and not to the judicial department of the Government, and that the courts can not decide the question whether it has been observed or not. (*Taylor v. Morton*, 2 Curtis C. C. R., 454.)

And precisely to the same effect is the following, from the *Head Money Cases* (*supra*):

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. *It is obvious that with all this the judicial courts have nothing to do and can give no redress.*

Indeed, where a suit between private parties turns on a question of boundary under a treaty with a foreign power, and the question has been determined by the political departments of the government, the courts will follow such decision, without inquiry as to its soundness. (*Foster v. Neilson*, 2 Pet., 253; *Garcia v. Lee*, 12 Pet., 511; *United States v. Reyes*, 9 How., 127.)

Accordingly, in his note to the Spanish minister of February 14, 1896, Secretary Olney treats it as "*admitted and established beyond controversy*" that the property of American citizens within the Spanish jurisdiction "may not be appropriated against the owner's will to the public use for military or any other purposes, *even though compensation be tendered.*"

It has been pressed upon us with great force that the reconcentration orders of General Weyler fell within the prohibition of the embargo clause of the treaty, but in view of the fact that both political departments of the Government, Congress and the Executive, have solemnly declared, in words that will long hold a place in the nation's memory, that the orders in question were brutal and inhuman violations of the rules of civilized warfare, and in view of the further fact that Spain herself must be taken to have acquiesced in that judgment by abandoning the odious features of reconcentration, in obedience to the remonstrances of our Government, thus fixing her liability under the law of nations, I deem it quite unnecessary to enter upon the consideration of the relation the embargo provision bore to the orders in question.

The refusal of the majority of the Commission to follow the decision of the Executive, that the embargo provision extends to all seizures and detentions of property for war purposes, may proceed on the idea that to hold Spain liable under such circumstances would be the same as saying that by adopting the embargo provision the contracting powers surrendered an important attribute of sovereignty.

So far from this being true, however, it may be conceded for the sake of argument, without materially weakening the case of the claimants, that such is not the sense of the provision, and that, if such were the true sense, the contracting parties had no right to barter away any part of the war-making power vested in them for the public good.

But it clearly remains, that these same contracting parties did have the right to stipulate that every expropriation of the property of the citizens or subjects of either by the other for war purposes or any other should be paid for; and such should be the reading of the provision if the language can not have its full operation, in obedience to the well-established canon of interpretation that where an instrument can not have effect in one way it may in another, rather than that the intention of the parties should be entirely defeated. *Quando res non valet ut ago, valeat quantum valere potest.* (*Jackson v. Bowen*, 7 Cowen, 13; *Robinson v. Ryan et al.*, 25 N. Y., 325; *Ruggles v. Barton*, 13 Gray, 506; *Grover v. Thatcher*, 4 Gray, 526; *Hunt v. Hunt*, 14 Pick., 374; *Freeman v. McGraw*, 15 Pick., 86.)

Practically, the embargo provision amounts to no more than a stipulation for indemnity, as no preventive remedy to anticipate a violation of the provision exists or could exist as between sovereignties, and when such violation occurs, being past recall, it leaves to the party injured a claim for the amount of the injury he has suffered, as was said by Secretary Fish in his letter of June 24, 1870, to our minister at Madrid, bringing to his attention, amongst other things, claims of our citizens whose property had been embargoed.

Considering the rather subordinate place the embargo provision of article 7 of the treaty of 1795 holds in the view I have taken of these demurrers, it has not been deemed necessary to prolong this opinion by quotations and references in support of the generalizations made above upon the diplomatic correspondence of our Government bearing on the provision.

But before leaving the treaty of 1795 I desire to advert briefly to its sixth article, which is as follows:

ARTICLE VI.

Each party shall endeavor, by all means in their power, to protect and defend all vessels and other effects belonging to the citizens or subjects of the other which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover, and cause to be restored to their right owners, their vessels and effects which may have been taken from them within the extent of their said jurisdiction, whether they are at war or not with the power whose subjects have taken possession of the said effects.

The meaning of this provision I take to be that the contracting Governments intended that the character of the protection which each should afford the property of its own citizens or subjects should not be the standard by which its duty to protect the property of the citizens

or subjects of the other within its jurisdiction should be governed, but that a greater degree of diligence should be observed, requiring that "each party shall *endeavor by all means in their power* to protect and defend" all such property and use "*all their efforts*" to recover and restore the same when seized within their jurisdiction by the subjects of other powers, whether they are at war or not with such powers.

To this article, in common with article 7, the majority of the Commission decline to give the effect which I think its language calls for. They concede that both articles were in operation during the late insurrection in Cuba, yet reject the standards of duty which those articles establish, and in their place enforce others supposed to be prescribed by a law which the parties in the exercise of the liberty of contracting have entirely superseded.

Unlike a violation of the embargo clause of article 7, which is fixed once for all by a definite public act of some sort, a breach of the protection guaranty of article 6 can seldom be established without an investigation of the facts of the particular case, in order to show whether the government charged had come up to the standard of diligence prescribed by the treaty.

This difference between the two articles seems to call for some notice of the rules of law and logic which should govern investigations of fact under the article in question; particularly, as what the Commission has laid down with regard to the necessity of alleging and proving Spain's delinquency in certain cases appears to have been understood by some as holding the claimant to a stricter rule than that imposed by the procedure and practice of the circuit courts of the United States, and with them courts generally in this country and in England, which I must presume the majority of the Commission had in contemplation when they made the ruling to which I refer; especially as we are required by law to follow that procedure and practice as far as practicable.

It is undeniable that an American citizen claiming indemnity for a property loss alleged to have occurred through Spain's default in not using all the means in her power to prevent it, has the burden of proving both the duty of Spain in the premises and her failure to perform that duty as prescribed by the treaty.

This burden of proof remains with the claimant until the end, unless he is relieved from it altogether by a defense which takes the form of a confession and avoidance; for then the claimant's cause of action is confessed and the burden of proof is on the defendant to establish the matter of avoidance on which the case now turns, for he, the defendant, has become *actor* or plaintiff as to such matter. *Reus excipiendo fit actor.*

While it is perfectly true that the burden of proof never shifts, it is equally true that the *burden of evidence or of going forward with*

evidence, may often shift from side to side in the trial, and the two propositions stand perfectly well together.

Unfortunately, the phrase "burden of proof" is also commonly used to express the idea conveyed by the phrase "burden of evidence." For example, it is usually said that the presumption of sanity in the accused shifts the burden of proof to him; which is an unscientific way of presenting the idea conveyed by a well-known writer on evidence that the presumption of sanity "*puts upon the defendant the burden of going forward with evidence upon the question*," but does not affect the duty of ultimately sustaining sanity," a duty which, I may add, always remains with the prosecution, as sanity is an integral part of the conception of criminality.

Let us consider then what is the logical process by which each party in turn overcomes what I may call the *inertia* of the court's neutrality between the litigants. It is this: The plaintiff begins by adducing evidence of a *prima facie* case; that is to say, such a case as, if believed by the jury, entitles him to ask for a verdict; to prevent which, it is now with the defendant to introduce evidence of a *prima facie* defense, upon which he may succeed, with the jury's help, unless plaintiff in turn overcome it by evidence in rebuttal.

What is a sufficient *prima facie* case must be answered by substantive law, and not the law of evidence; but there is no hard and fast rule on the subject, the requirement varying with different classes of cases. In some a mere *scintilla* of evidence, as it were, suffices to tip the beam and shift to the defendant the burden of going forward with the evidence, as in suits against carriers of passengers for personal injuries. In others the plaintiff is held to a stricter requirement, as in actions for malicious prosecution. It thus appears that the courts have a considerable range of discretion in determining when a party may rest for the time being and when the other party may fairly be called on to explain.

Returning now to the case of an American citizen claiming indemnity before this Commission for property losses in Cuba through the failure of Spain to afford the protection required by Article VI of the treaty, I think it is a proper deduction from the authorities that the United States, as the representative of Spain, can be fairly called on to explain in any such case where the claimant offers evidence to show that his property has been lost or destroyed by some violent and arbitrary act, which, it will be presumed for the time being, was in consequence of Spain's neglect of duty under the treaty.

Doctor Wharton supports this view on the authority of the Supreme Court of the United States in the case of the *Chicopee Bank v. Phil. Bank* (8 Wall., p. 641), and on the authority of other cases. He says:

When a person who contracts to perform a particular duty to another person or thing is sued for negligent injury to such person or thing, then the plaintiff need

only prove the injury; and the burden [meaning, of course, the burden of going forward with the evidence] is on the defendant to excuse himself by proof of the exercise of due diligence. What such diligence is, depends upon the nature of the contract, as elsewhere discussed. That it must be proved as an excusatory defense by the defendant, and that the burden is on him to do so, is plain.

He then illustrates the proposition by an example taken from the Roman Digest:

A herd of goats are taken by a herdsman to pasture. They are carried off by robbers, without the fault of the herdsman. *It is not necessary for the owner to prove want of due care in the herdsman; but the burden is on the herdsman to prove that the loss of the herd was not due to want of due care by himself.*

He then concludes as follows:

Public policy, in such case, unites with juridical principle in requiring the defendant (i. e., the party undertaking by contract to do a particular thing) to show, when sued on the contract, either that the thing was done by him, or that he has good grounds of excuse. (Evidence, vol. 1, sec. 362.)

In *Chicopee Bank v. Phil. Bank* (*supra*), the Supreme Court say:

Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is that the loss or damage was occasioned by his negligence or want of care of himself or of his servants. This presumption arises with respect to goods lost or injured, or which have been deposited in a public inn, or which have been intrusted to a common carrier. But the presumption may be rebutted.

This was said in a case where the defendant bank was sued for neglecting to give notice of the default of the acceptor of a bill of exchange sent to it for collection, whereby other parties to the bill were discharged, and where the trial court held that the plaintiff had made out a *prima facie* case by showing the transmission of the bill to the other bank and the latter's failure to give notice.

So in *McGregory v. Prescott* (5 Cushing, 67), the defendant objected that plaintiff had given no evidence of nonperformance of the contract sued on, to which the court answered that the objection was "against first principles," and that "on an affirmative contract being proved to pay money or perform some duty, it is incumbent on the defendant to prove payment, performance, or tender, or an excuse therefrom."

In *Tarbox v. Eastern Steamboat Co.* (50 Me., 339, 344), it was held sufficient to support in the first instance the plaintiff's averment of loss or injury by the defendant, a common carrier, "to show that the goods have not arrived or have received an injury." To the same effect is *Dawson v. Chamney* (5 Q. B., 164), which was an action against an innkeeper.

It would be unreasonable, and in many cases a virtual denial of justice, to debar claimants before this Commission under Article VI from the right to call on the United States to move forward with the evidence on a *prima facie* case being made out by claimants, showing

some open act of seizure of their property in Cuba, without attempting to do more; and the same may be said with regard to claimants for property losses generally caused by the Spanish authorities or by the insurgents.

No such illogical obstruction to the course of justice as that supposed would be tolerated for a moment in the circuit courts of the United States, to whose procedure and practice, we have seen, this Commission is required to conform so far as practicable.

Let me observe, in conclusion, that what is said above under Article VII of the treaty of 1795, to the effect that the article can have operation without detriment to the war-making or other powers of the contracting parties, applies equally to Article VI of the treaty, and need not be repeated.

It is proper to say that the omission to notice anything in the opinion of the majority that would seem to call for notice in this opinion may be ascribed to the fact that I have not seen that opinion.

DISSENTING OPINION OF COMMISSIONER CHAMBERS.

Commissioner CHAMBERS. Demurrers have been interposed in all cases before the Commission which relate to property damages, and raise four questions of primary importance.

First. The right of an American citizen to recover for damages done during the insurrection in Cuba by insurgents to whom belligerent rights were denied by both Governments.

Second. The right of American citizens to recover damages resulting from injuries committed by Spanish authorities during the insurrection.

Third. Were the reconcentration orders as executed during the insurrection in Cuba legitimate acts of war, and what results therefrom or from other military orders create a liability in favor of American citizens for damages to their property?

Fourth. Construction of the treaty of 1795 between the United States and Spain, and the protocol of 1877, and their applicability to the cases now under consideration.

Bearing upon these questions many briefs were submitted by counsel on both sides, and, in response to request from counsel and special orders of the Commission, oral arguments were heard on four separate occasions, participated in by numerous counsel for claimants and special as well as general counsel of the Government. No limitations, either as to number of counsel or time, were imposed by the Commission.

Few questions in modern jurisprudence have been more thoroughly argued, and perhaps no tribunal of the United States, save the Supreme Court, has listened to counsel more distinguished in the field of international law than the array of able lawyers who have appeared on both sides in this discussion; and thus it is proper to acknowledge that everything has been said in behalf of the claimants, and in defense for the Government, to assist the Commission in deciding the questions submitted "according to the merits of the several cases, the principles of equity and of international law."

In those cases where the claim arose out of injuries done by insurgents, the form of the demurrer is as follows:

That the acts complained of were committed, and the property for which indemnity is asked was destroyed, by insurgents in revolt against the Spanish Government, and no liability attached to Spain, and there is no liability on the part of the United States for such acts so committed, by reason of the law of nations or any treaty stipulations between the United States and Spain.

In cases where the injuries were committed by Spanish authorities the demurrer is as follows:

That the acts complained of belong to the category of those incidents of warfare for which the petitioner has no remedy under the law of nations or the treaties between the United States and Spain.

And in those cases where it is claimed that the damages were the result of injuries inflicted partly by insurgents and partly by Spanish authorities, or by parties unknown, both forms of demurrer were used, together with a general one, as follows:

That said petition does not contain facts sufficient to constitute a cause of action.

There are three classes of cases involving the question of liability for damages caused by the insurgents:

First. Those in which it was assumed by claimants that the treaty of Paris and the act of Congress of March 2, 1901, created an absolute liability against the United States, and alleged only the fact of destruction in connection with the general jurisdictional facts.

Second. Cases in which, besides the jurisdictional facts, and the destruction by insurgents, it is alleged that the loss resulted from the want of due diligence on the part of Spain to protect, notwithstanding its duty, etc., to do so, under the law of nations and treaty obligations.

Third. Petitions which not only set out the jurisdictional facts, the destruction by insurgents, the duty of Spain to protect and the failure to do so, but, in addition, aver the ability of Spain to furnish protection, and the facts and circumstances which, if proven, would show that at the particular time and place where the damages were done, the Spanish authorities, by due diligence, might have prevented them.

The cases in which damages resulted from the acts of Spanish authorities are similarly divided into three classes:

First. Petitions which aver nothing beyond the jurisdictional facts, except the destruction by Spanish authorities.

Second. Cases in which the allegation is made that the destruction was wantonly and unnecessarily done by Spanish authorities contrary to the rules and usages of international warfare.

Third. Those cases where the petitions, besides the averments of the first and second classes, set out in detail the facts which constitute the unnecessary and wanton character of the destruction and the acts of the Spanish authorities or soldiers which, if proven, would be contrary to the rules and usages of international warfare.

As a demurrer admits all the facts properly pleaded, it is not necessary, in this connection, to consider the facts in the cases submitted for decision except in so far as to determine whether those facts are sufficient, under the treaty of peace and the act of Congress, to carry

that treaty into effect, and, according to the established rule of pleading, to make out a *prima facie* case. The demurrers in these cases not only technically admit the truth of the facts as pleaded, but affirmatively allege (1) "That the *acts* complained of belong to the category of those incidents of warfare for which the petitioner has no remedy under the law of nations or the treaties between the United States and Spain," and (2) "That there is no liability on the part of the United States for such *acts* so committed, by reason of the law of nations or any treaty stipulations between the United States and Spain."

These demurrers, therefore, interposed in every case, irrespective of whether the injuries and losses complained of were committed by the authorities of Spain or by the insurgents, deny all and every liability for such injury and losses upon one or the other of two grounds: (1) That war in the international sense existed between Spain and a part of her subjects in the island of Cuba, or (2) that the insurrection got beyond the control of the Spanish authorities through the breaking loose of a part of the population, making it impossible for Spain to have prevented the injuries.

To sustain the first proposition would be equivalent to declaring that Spain was presumptively exempt from liability for all the acts of her military authorities which the petitioners allege resulted in damages and losses, because a state of war, in the international sense, existed at the time the injuries were done; and if the second proposition is sustained, it would be equivalent to declaring that Spain was presumptively exempt from liability for all the injuries committed by insurgents, because during a period of insurrectionary warfare in Cuba a part of her subjects got beyond control; and an adjudication in accordance with the defendant's contention as raised by the demurrers would therefore practically exempt Spain from all pecuniary liability growing out of the acts committed either by her military authorities or the insurgents between the beginning of the late insurrection in Cuba and the exchange of ratifications of the treaty.

But the rule of presumptive liability, as I understand it, is just to the contrary, and therefore it is a sufficient answer to the first proposition to say a presumption of liability arises against a nation for injuries done to neutral foreigners upon the principle, as stated by Hall in his work on International Law, that "*prima facie* a nation is of course responsible for all acts and omissions taking place within its territory by which another state, or subjects of the latter, are injuriously affected;" and the second proposition is negatived by the well-settled rule that the duty is imposed by international law upon a nation to prevent its citizens from injuring foreigners or damaging their property, upon the principle that the offending citizens being under its authority, it is obliged to watch over them and so control them that they can do no injury to the foreigner or his property.

Under this rule of presumptive responsibility, the foreigner is not called upon to do anything more than to prove the injury, in order to make out a *prima facie* case; and the state that committed the injury, or suffered it to be done, is called upon to rebut this presumptive liability, which may be done by showing, in the case of an insurrection, that the resources at its command for that purpose have been exhausted by the parent nation; or, that the insurrectionary movement actually reached such a status that the jurisdiction of the parent government was ousted in the territory, and the acts complained of were committed by that part of the population which, having broken loose from control, established for itself another jurisdiction, to which attached *eo instanti* the same international responsibilities that originally existed against the parent government in that territory. In other words, where an insurrection exists, the normal state of things (that is, the sovereignty of the parent state over all of its territory and citizens) is presumed to continue, so far as the responsibility for injuries to the persons and property of foreigners is concerned, until another political "homogeneous political entity" has sprung up, in consequence of the powerlessness of the parent state to prevent injuries, and has displaced the ancient order of things; and the "broken loose" part of the population has, in an international sense, become substituted for the parent state as the guarantor of indemnity to foreigners for injuries done to their persons or property.

There can be no lapse of responsibility for such injuries where a struggle is in progress in which the parent State on the one hand is repressing an insurrection, and on the other hand where a part of its citizens or subjects are engaged, through violent efforts, in throwing off the titular authority. In the case of a mere mob, when there is no organized political purpose to establish a separate independence, the responsibility of the parent government necessarily continues without abatement or interruption; but in the case of an insurrection, which is the offspring or outgrowth of a political purpose, well defined, to organize and maintain an independent government, there may come a time when the responsibility of the parent government for injuries to foreigners ceases; but at the moment of its cessation the responsibility attaches against the authority which has displaced the ancient order of things. But as long as the insurrectionary character of the struggle continues, and neither the titular government nor the government of the injured foreigner accords belligerent rights to the rebels, the liability, if any, is against the old State. An established government can not be presumed to have lost control of a part of its rebellious subjects. The loss of control is a fact, which being exculpatory, must be proven by a State which invokes the doctrine in order to relieve itself from liability for injuries to foreigners. (See *Venezuela Steam Trans. Co. case*, Moore, *International Arbitrations*, Vol. II, pp. 1693-1732; *Baldwin case*, *ibid.*, Vol. III, pp. 2859-2866.)

So far as the character of the war is concerned, the Commission by unanimous agreement has decided that notwithstanding "the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense which exempted the parent government from liability to foreigners for the acts of the insurgents." See announcements of the Commission April 25, 1903, *ante*. It will be seen that this is an absolute acknowledgment that the Commission must accept the conclusions of the political departments of the Government, without considering any facts, whether judicially known or otherwise, regarding the duration and magnitude of the insurrection, and that therefore it never reached a state of war in the international sense so as to exempt the parent government from liability to foreigners for losses and damages.

This being the unanimous decision of the Commission it is not thought advisable to lengthen this opinion by voluminous quotations from messages of Presidents, resolutions of Congress, or diplomatic correspondence. But the underlying significant principle to which we are thus committed is that the character of the war—that is, that it was not a state of war in the international sense—was agreed to because the political branch of the Government had already determined its status. In other words, that the opinion of the Commission on this vital question follows and rests its validity upon the action of the political departments of the Government.

But this decision is emasculated by a contemporaneous announcement of a majority of the Commission that this "Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed, from the first, beyond the control of Spain and so continued until such intervention and war took place," and that "where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents."

The fallacy of this decision consists not so much in the announcement of the principle of liability in the case of an insurrection beyond control, which is by no means admitted as an absolutism, as in the conjunctive announcement that the Commission will take judicial notice of the *fact* of beyond control. It is conceded that some of the writers on international law lay down the principle of liability as stated by a majority of my colleagues, but none of them has undertaken to lay down a general rule by which it may be determined that a state of "beyond control" exists, or by which a court would be justified in taking judicial notice of a condition of "beyond control" in the case of insurrectionary warfare between a foreign government and a part

of its own subjects, carried on wholly in territory foreign to the nationality of the court. Having decided to take judicial notice of insurrection beyond control, my colleagues who concur in that view, announce the further principle, that Spain was entitled to adopt such war measures for the recovery of her authority as are sanctioned by the rules and usages of international warfare. And thus "the late insurrection in Cuba," which the whole Commission agreed never reached proportions or conditions such as "to create a state of war in the international sense, which exempted the parent Government from liability to foreigners for the acts of insurgents," is, in effect, lifted by a decision of the majority, from a state of war in which "anarchy, lawlessness, and terrorism were rampant" to the plane of international warfare; for, in the same breath in which it was stated that the general rule fixed liability upon Spain because "war in the international sense" did not exist in Cuba, the majority assert that having taken judicial knowledge of an insurrection which had passed beyond control from the first, Spain is entitled to exemption from liability for damages to foreigners resulting from measures employed in the recovery of her control, the responsibility being limited and determined in that case by the same general rules which limit and determine liability in the case of international warfare.

In this decision of a majority of my colleagues I can not concur, because, in the first place, I do not think it is sustained by the general principles of international law, to say nothing of the principles of equity, as interpreted by the Supreme Court; and secondly, because it is at variance with the attitude of the Government of the United States as interpreted in its political and diplomatic declarations. That a domestic tribunal, such as this Commission, in its creation and constitution, can take judicial notice that an insurrection which continued through several years of fluctuating fortunes, exclusively within foreign territory, which never attained success through its own efforts, where the insurrectionists were refused belligerent rights by both Governments, was beyond control of the titular Government from the moment of its inception, throughout the length and breadth of the country, until a foreign government steps in and stops the "barbaric warfare," is a principle without precedent in jurisprudence so far as I have been able to discover.

The utmost the Government of the United States ever did was to recognize the existence of the insurrectionary warfare (see *The Three Friends*, 166 U. S., pp. 63-65). The Government of the United States nowhere committed itself to the position, or even so much as suggested that the insurrection was from the first, at all times and everywhere, beyond the control of Spain. On the contrary, the declarations of this Government and of the Spanish Government were substantially agreeable in reference to the right and ability of Spain to control. It

would be impossible now to defend or explain the course of the Government of the United States throughout the period of insurrectionary warfare, which it recognized only in that light, upon any other theory than that of Spanish control.

President Cleveland, in his message of December 7, 1896 (Mess. Presidents, Vol. IX, p. 772), based his opposition to intervention at that time upon the assertion of ability by Spain to control, and used this significant language:

When the *inability of Spain to deal successfully with the insurrection has become manifest*, and it is demonstrated that her *sovereignty is extinct in Cuba* for all purposes of its rightful existence, * * * a situation will be presented in which our obligations to the sovereignty of Spain will be superseded by higher obligations which we can hardly hesitate to recognize and discharge. * * * But I have deemed it not amiss to remind the Congress that *a time may arrive* when a correct policy and care for our interests * * * will constrain our Government to such action as will subserve the interests thus involved.

During the following year, as will be seen by reference to the voluminous correspondence on the subject between the two Governments, Spain continued to assert her ability to control and this Government acquiesced. Even as late as December 6, 1897, President McKinley urged nonintervention on that ground, the facts as ascertained by the Executive satisfying him that the time had not yet arrived "when the inability of Spain to deal successfully with the insurrection has become manifest." (Mess. Presidents, Vol. X, pp. 128-134.) And it was not until the Executive and Congress actually determined to intervene that the "inability of Spain to deal successfully with the insurrection" became a *fact* and that the time to which President Cleveland alluded, in his message of December 7, 1896, had arrived "when a correct policy and care for our interests * * * will constrain our Government to such action as will subserve the interests thus involved."

If, therefore, a state of war in the legal or international sense did not exist in Cuba, because of the refusal of either Government to grant the insurgents belligerent rights, why, it may be asked, should not the character of the "insurrection"—that is, whether beyond control—be determined by the same rule or authority?

The general rule is that courts do not take judicial notice of war between foreign States, unless by some act of the executive department of their own government the foreign war has been recognized. Therefore the existence of war between foreign countries in which the government of the court is not interested must be proved. (*Dolder v. Huntingfield*, II Ves., Jr., 292.) It is only where the executive department of the domestic government has recognized the existence of war in foreign territory that courts can take judicial notice of the fact. (*Underhill v. Hernández*, 168 U. S., 250.)

Following the principles laid down in the two cases last referred to, the principle would seem to be indisputable that courts can not take judicial notice of the characteristics of an insurrection entirely foreign to their national territory and government unless the political department of the domestic government has, by distinct acts, determined its character. If, therefore, a court of the United States can not take judicial notice of the existence of a war between foreign countries, nor of insurrectionary warfare beyond its national territory, except in consequence of action by the executive department of its Government, it necessarily follows that a court in the absence of executive action can not judicially know that an insurrection in a foreign country has passed beyond control of the parent government.

If it be a sound principle that proof must be resorted to to establish the *fact* of an insurrection in a foreign country, and even of the fact of a war between foreign nations in the absence of executive action, courts must necessarily require proof to establish the fact when, if ever, such an insurrection actually reached the stage of "beyond control."

In adjudicating the cases at bar the Commission has held that the conflict in Cuba was not a war in the international sense, because *the Government declined to so recognize it*, and has taken judicial notice of the fact that it was a mere insurrection, because, in the first place, the treaty of Paris, between Spain and the United States, denominated the conflict an "insurrection;" in the second place, because the organic act, passed in execution of the terms of the treaty, denominated it an "insurrection," and, in the third place, because the Executive Department of the Government so classed it; therefore neither proof nor argument was necessary to convince the court that it had the right to take judicial notice of the fact of an insurrection in Cuba. The Commission was compelled to take judicial notice of that fact; but when we approach the question as to what kind of an insurrection it was, we find nothing in the treaty or in the organic act upon which to base judicial knowledge. The treaty is silent as to whether the insurrection was or was not beyond control, and the act of March 2, 1901, is equally silent on that subject. Nor has the political department of the Government so defined and established the characteristics of the insurrectionary warfare as to justify the Commission in taking judicial notice that it was beyond the control of Spain.

In accordance with the doctrine stated in cases referred to by counsel, courts have taken judicial notice of many things which occurred during the late civil war in this country, but even in the case of that great war, which the Supreme Court held to be a war in the international sense, that high tribunal said it knew of no rule of law by which it was required to take judicial notice of proclamations and orders issued by a major-general of the United States Army commanding a

large and important district during the war. How, then, can this court predicate judicial knowledge of the fact that the insurrection in Cuba (a foreign country) had passed beyond the control of Spain, upon the orders, proclamations, edicts, etc., of certain alleged foreign army officers, and correspondence between insurgents and subordinate officials of Spain

Applying the "rule of care" regarding requisite notoriety, as so clearly stated in the case of *Brown v. Piper*, 91 U. S., 37, and obeying the injunction that "every reasonable doubt upon the subject should be resolved promptly in the negative," a court of the United States will not be justified in taking judicial notice of the character imparted to the insurrectionary warfare by such facts as the demurrers suggest; as, for instance, whether beyond control or not, when it knows that all these things transpired entirely in a foreign country, unless the government itself had taken the requisite action to ascertain the existence and truth of those facts and thereby put all its courts on notice of them.

Although it has been held that the admission of evidence to prove a fact of which the court has taken judicial notice is not reversible error on appeal, inasmuch as the parties could not be prejudiced thereby (see *Gormley v. Bunyan*, 138 U. S., 623), yet the general rule is that when a court has taken judicial notice of the existence of a fact, and to which the rule is properly and strictly applicable, such fact is to be deemed conclusively established without the admission of any evidence.

These being the well-settled principles in reference to the conclusiveness of judicial notice, it follows that judicial knowledge of a fact is the end of all controversy concerning that particular fact, and a court, having taken judicial notice of a fact, commits error when it offers to hear evidence to disprove that fact. A court can not take judicial notice of a fact about which it is in doubt, and therefore can not take judicial notice of a fundamental fact, and, in the same breath, offer to hear evidence in regard to a multitude of other facts, which, if proven, will show that there was in truth no ground on which to base its judicial knowledge.

It will be observed in the case of *Gormley v. Bunyan*, supra, that the court excuses the admission of evidence to prove a fact of which judicial notice had been taken on the ground, and only on the ground that neither of the parties could be injured thereby, and therefore decided to reverse the case on that assignment of error. But suppose the lower court in that case had admitted evidence to disprove a fact of which it had taken judicial knowledge, and that action had been the assignment of error on which the appeal was taken; can there be any doubt that the Supreme Court would have reversed the case?

Now let us apply these principles, by way of illustration, to the question as presented by the cases at bar. It has been decided that "this Commission will take judicial notice that the insurrection in

Cuba" "passed from the first beyond control of Spain, and so continued until such intervention and war took place," which, of course, means that the insurrection was beyond control at all times and at all places in the island of Cuba from February, 1895, to April, 1898; that is, in every district, in every community, and on every plantation, on every day during that time. But in announcing this decision a majority of the Commission goes on and admits that this may not after all be true, and so, with all the facilities and time needful, all of the several hundred claimants will be permitted to amend their pleadings and furnish evidence to prove that the Commission was mistaken; and then suppose that a majority or all of the claimants should succeed in proving that throughout the island, irrespective of districts, on this and that and the other plantation, at times running all through the period of the insurrection, the Spanish authorities actually were in control or could have controlled, an anomaly in jurisprudence would be presented. The Commission would be compelled, upon consideration of the claims on their merits, to reverse the ruling as to judicial notice, and would be forced to confess that a great injustice had been done the claimants, contrary to the fundamental right which the laws of the land guarantee to all litigants who seek for justice in its courts to establish their rights in the quickest possible time with the least possible cost and hindrance.

In any case, courts necessarily proceed with extreme caution in the employment of the power of judicial notice, and, under the most liberal interpretation of the doctrine, will not apply it so long as there exists a reasonable doubt in the mind of the court as to the actual truth of the facts upon which the issue depends.

In *Brown et al. v. Piper* (91 U. S., p. 43) the court says:

This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

And again, in the case of *Kaolatype Engraving Co. et al. v. Hoke et al.* (30 Fed. Rep., p. 444), it is said:

Judicial notice will not be taken of facts stated in encyclopedias, dictionaries, or other publications unless they are of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person.

No facts are formally pleaded in the demurrers, but the defendant, in legal effect, seeks to incorporate into the plaintiff's pleadings affirmative facts which the Government would be compelled to present if required to substantiate the plea. In antagonism to the facts as pleaded by the petitioner, and which, it is insisted, make out a *prima facie* case, the defendant, while admitting those facts to be true, asks the court to take judicial notice of many other facts, which, if true, show that the defendant is not liable for the injuries complained of.

In other words, the court is asked through the employment of judicial knowledge to take notice of an array of facts more or less notorious and historical and wholly outside of the pleadings in the cases as presented by the claimant, which, according to the principles of international law, the defendant insists raised the struggle in Cuba to the character of an international war, or of an insurrection beyond the control of the authorities of Spain, and in consequence of which the Commission must presume that it was impossible for Spain to have prevented the injuries.

The situation, therefore, is this: That the petitioner sets out in his pleadings a state of facts which, it is admitted, constitute a *prima facie* case, and the defendant, to escape the liability which such an admission involves, invokes by demurrer the doctrine of judicial notice, through which the court is asked to take knowledge of other facts, not pleaded, as a complete rebuttal of the presumption of liability.

It should be remembered, however, that the petitioner does not admit, but presumptively denies, the truth of the facts of which the defendant insists the court could properly take judicial notice. Assuming, however, that there might be such facts as the demurrer suggests, can the defendant inject them into the claimant's petition? The authorities do not seem to sustain such pleading. While it is true that judicial knowledge will enable a court to disregard false averments in a pleading, this seems to be as far as any authority has ever gone, and I can not find any precedent to support the proposition that a court can, by the employment of judicial knowledge, incorporate in the plaintiff's pleading any affirmative facts whatsoever. The plaintiff has the right to stand or fall by whatever facts he has seen fit to plead. In other words, the court, through the application of the doctrine of judicial knowledge, may negative and ignore wrong allegations of fact as well as wrong conclusions of law; that is to say, a wrong allegation, on demurrer, is not deemed to be impliedly admitted.

In the case of *Taylor v. Barkley* (2 Sim., p. 213) a bill in equity was dismissed on demurrer by Vice-Chancellor Shadwell because he had ascertained, after communication with the foreign office, that the Republic of Central America had not been recognized as an independent government by the King of England, the averment having been made in the pleadings that the Republic of Central America was a sovereign and independent State, recognized as such by the King. The learned chancellor said:

Inasmuch as I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of this country, I conceive that, notwithstanding there is this averment in the bill, I am bound to take the fact as it really exists, not as it is averred to be.

Nothing is taken to be true except that which is properly pleaded; and I am of opinion that when you plead that which is historically false, and which the judges are bound to take notice of as being false, it can not be said that you have properly pleaded, merely because it is averred, in plain terms; and that I must take it just as if there was no such averment on the record.

It is an equally well-established rule that extraneous affirmative facts can not be introduced by the defendant or by the court against the will of the plaintiff into his pleading in support of a demurrer thereto.

In the case of *Stewart v. Masterson* (131 U. S. Rep., p. 151) the court reversed the decision of the court below because the trial judge had permitted the defendant, on a demurrer to a bill in equity, to introduce facts not pleaded by the bill, and on appeal it was held that a demurrer to a bill in equity can not introduce as its support new facts which do not appear on the face of the bill and which must be set up by plea or answer.

If the claimants in the cases at bar have affirmatively pleaded facts material to the support of their positions which are false, and the "facts of history" to the contrary possess the characteristics of "requisite notoriety" and verity which remove "every reasonable doubt," the court would undoubtedly be justified through the exercise of judicial knowledge in sustaining demurrers.

If the principles as above stated be correct and the reasoning be sound, the conclusion as to the first question raised by the demurrers must be that a neutral American citizen properly residing in Cuba, whose property was damaged or destroyed, presumptively has the right to recover for the actual damages done by insurgents to whom belligerent rights were denied by both governments, and therefore the demurrers in all such cases should be overruled.

As the same principles and reasoning apply to the demurrers in those cases where the claim for damages grows out of injuries committed by Spanish authorities during the insurrection, it is deemed unnecessary to discuss the subject over again. In my judgment it can not be assumed on demurrer that the destruction of the property of an American citizen by Spanish authorities or troops was one of those necessary incidents of warfare which relieve the destroyer from liability, and justice to all parties requires that the burden should be upon the defendant, after the claimant has made out his prima facie case, to prove not only the fact that the insurrection passed beyond the control of Spain, but in addition thereto that in its efforts to suppress the insurrection and restore that part of its territory in which "anarchy, lawlessness, and terrorism were rampant" to the conditions of peace and security required of all well-ordered governments, the destruction was a necessary act of war—justifiable according to the rules and usages of civilized warfare; and therefore the demurrers in all the cases

involving damages committed by Spanish authorities should also be overruled.

In all cases, therefore, whether the damages were the result of injuries done by the authorities of Spain or by insurgents, where the demurrers raise the question of "insurrection beyond control" I lay down the principle as the basis of my conclusions on the phases of the cases as thus presented, that it is a question of fact to be determined primarily on proof to be furnished by defendant in each case—first, when the insurrection reached a stage of beyond control; second, whether, notwithstanding the insurrection had, in a general sense, gotten beyond control, the authorities of Spain by the exercise of due diligence could not have prevented the injuries done at a particular time and place; and, third, that the acts of the Spanish authorities which caused the damages were not contrary to the rules and usages of international warfare.

These are all vital questions, going to the very heart of the subject for which Article VII of the treaty was enacted and for which the act of March 2, 1901, was intended to provide. It is inconceivable that the treaty makers who were dealing with great problems of human liberty, taking over vast archipelagoes with millions of oppressed human beings, and passing over without stint or requirement millions of gold to a conquered foe, ever contemplated that the generous provisions made for a few hundred of our own people, whose property had been destroyed through the awful methods of devastation employed by Spanish troops and insurgents alike, might be denied them on the suggestion of a demurrer.

It is true the act of Congress, in providing for the presentation, preparation, and defense of these claims authorizes, and, in fact, requires the Attorney-General either to demur or to answer, but it is made manifest, when all the parts of the act are considered in connection with the treaty provisions, that a demurrer in the sense in which it has been employed and interpreted here can not have been in contemplation. It was evidently intended that the demurrer should be interposed, if necessary to get the case in proper form for investigation and adjudication upon its merits, and consequently such questions as citizenship, neutrality, time, place, and others covered by the requirements of section 9 might properly have been raised by demurrer. The examination of sections 9 and 10 of the act bear out this reasonable interpretation.

SEC. 9. That every claim prosecuted before said Commission shall be presented by petition, setting forth concisely and without unnecessary repetition the facts upon which such claim is based, together with an itemized schedule setting forth all damages claimed. Said petition shall also state the full name, the residence, and the citizenship of the claimant, and the amount of damages sought to be recovered, and shall pray judgment upon the facts and law. It shall be signed by the claimant or his attorney or legal representative, and be verified by the affidavit of the

claimant, his agent, attorney, or legal representative. It shall be filed with the clerk of the commission, and the prosecution of the claim shall be deemed to have been commenced at the date of such filing. All claims shall be filed as aforesaid within six months from the date of the first meeting of the Commission, and every claim not filed within such time shall be forever barred: *Provided*, That the Commission may receive claims presented within six months after the termination of said period if the claimants shall establish to their satisfaction good reasons for not presenting the same earlier.

The part of section 10 referring to defense of claims is as follows:

SEC. 10. * * * It shall be his (the Attorney-General's) duty to defend the interests of the United States, and he shall, within sixty days after the service of the petition upon him, unless the time shall be extended by order of the Commission, file a demurrer or answer to said petition, which answer shall set up all matters of counterclaim, set-off, claim of damages, demand, or defense whatsoever of the Government against such claim. * * *

It will be observed that section 9 provides all the essential requirements which are to be complied with by a claimant in the presentation of his petition, and it will also be observed what the essential requirements of the "answer," as provided for in section 10, are to be. The answer, however, may not be filed until all the essentials of section 9 have been complied with by the petitioner, and to raise any defect in the petition which the claimant might or might not be able to correct by a subsequent pleading the interposition of a demurrer was authorized. Scrutiny of section 9 will disclose that Congress intended the claimants should make a clear statement of everything necessary to present a *prima facie* claim, and any lawyer of general practice, without a familiarity with expert pleading, will see that a petition, irrespective of its fundamental merits, might be defective in any one of a dozen or more respects, all of which might be raised by demurrer before the case should be allowed to go on its merits. It is, therefore, evident to my mind that the treaty makers when they provided that "the United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article" never contemplated any resistance on the part of the United States that did not go to the essential merits of the claims themselves; and, furthermore, that the Congress in stipulating that the Commission "shall adjudicate said claims according to the merits of the several cases, the principles of equity, and of international law," did not even remotely anticipate any defense by the United States beyond "matters of counterclaims, set-off, claim of damages, demand, or defense" which went to the actual merits of the claim. In other words, the statutory as well as equitable defense going to the merits of the claims must be made by "answer" only, either denying in whole the allegations of the petition, or by setting up "all matters of counterclaim, set-off, claim of damages, demand, or defense whatsoever of the Government against such claim."

CONSTRUCTION OF THE TREATY OF 1795.

When we come to consider the rights of American citizens to immunity from harm within Spanish territory under the provisions of the treaty of 1795 between the United States and Spain and their right to recover damages for injuries thereunder by whomsoever done, we approach an entirely new phase of the question, and one that extricates the subject from the perplexities in which the demurrers placed it, and lifts it above the mists which envelop it in consequence of the conflicting views of international-law writers, too frequently, it may be, influenced by geographical situations or political exigencies.

The provisions of the treaty necessary to be considered are Articles VI and VII.

ARTICLE VI.

Each party shall endeavor, by all means in their power, to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover, and cause to be restored to their right owners, their vessels and effects which may have been taken from them within the extent of their said jurisdiction, whether they are at war or not with the power whose subjects have taken possession of the said effects.

ARTICLE VII.

And it is agreed that the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever; and in all cases of seizure, detention, or arrest for debts contracted or offenses committed by any citizen or subject of the one party within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only, and according to the regular course of proceedings usual in such cases. The citizens and subjects of both parties shall be allowed to employ such advocates, solicitors, notaries, agents, and factors as they may judge proper in all their affairs and in all their trials at law in which they may be concerned before the tribunals of the other party, and such agents shall have free access to be present at the proceedings in such causes and at the taking of all examinations and evidence which may be exhibited in the said trials.

Whatever may have been the rights and obligations as imposed by international law in regard to the immunities enjoyed by foreigners residing within the territorial limits of a nation with which their government was on terms of peace and amity, and the rights of such foreigners to recover damages for injuries to their persons and property committed by the authorities or subjects of such nation without just cause given therefor by the injured person, the provisions of an express treaty, covering the subject-matter, make unnecessary any examination of the principles of international law except in so far as they throw light upon the treaty provision. In the provisions of the treaty under consideration we have a clear and definite assumption of responsibility; the terms are remarkably free from limitation. The

Commission, proposition 10, *ante*, has announced that the provisions of the treaty of 1795 "were in full force and effect during the insurrection in Cuba," and that "whether or not the clause" (first clause of Article VII, wherein it is agreed that the subjects and citizens of each nation, their vessels, or effects shall not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever) "was originally intended to embrace real estate and personal property on land as well as vessels and their cargoes, the same has been so construed by the United States, and this construction has been concurred in by Spain, and therefore the Commission will adhere to such construction in making its decisions." (See Announcements of the Commission, April 28, 1903, *ante*.)

Here again we have the reason given by the Commission why it arrives at this conclusion, namely, that the treaty "has been construed by the United States," which is a distinct and significant admission that in construing the terms of a treaty, as well as interpreting the principles of international law, a court of the United States must revert to the construction and declarations of its Government as its ultimate authority on such questions. It only adds additional force and conclusiveness to the proposition to say that "this construction has been concurred in by Spain." The construction placed upon the treaty by the Government of the United States would be as conclusive upon this Commission, however, so far as the merits of the claims under consideration are concerned, if Spain had not concurred therein. The history of the treaty and the diplomatic correspondence between the two governments leave no room for doubt that the Commission in its announcement has correctly stated the situation. The Government of the United States consistently and unbrokenly maintained this position, and while "Spain at no time seriously contended that acts of spoliation and expropriation by her administrative authorities in Cuba, so far as they affected the rights of United States citizens, were not in conflict with the treaty of 1795," yet her diplomatic officers "sought to relieve Spain from liability by construing the treaty in such a way as to draw a distinction between the embargo of property for the use of any military expedition or for public or private purposes, as prohibited in the seventh article of the treaty, and an embargo of property in order to prevent the sustenance and encouragement of the insurrection." A long correspondence between the two governments shows that the Spanish diplomats sought every possible escape from the liabilities resulting from the construction placed upon the treaty provisions by the Government of the United States, but, finally, when brought face to face with the question, and no further opportunity was left for innuendo or sophistry, the Spanish Government acknowledged that Article VII expressly meant what the Government of the United States had all

along contended for. (Letter of the Duke of Tetuan to Minister Taylor, April 24, 1897, on file in the State Department, but not in print so far as my examination discloses.) It was manifestly the purpose of the treaty "not merely to remove all doubt by making a definition of Spanish international obligations to the United States and its citizens, but also to increase that obligation, so that Spain should be liable, not simply for failing to furnish the same protection to foreigners that she did to her own subjects, but for failing to use, in the language of the treaty, 'all means in their (her) power' to protect the property of citizens of the United States." Thus the treaty accepts and recognizes the *prima facie* liability for all damages suffered by foreigners within the territory of each of the contracting parties, and the only escape from the burden of that *prima facie* liability permitted by the treaty is by showing that "all means in their power" have been employed to protect the property in question.

The terms of Articles VI and VII are broad and sweeping and afford Spain no excuse for the acts of her military authorities which resulted in the destruction of the property of American citizens, unless it be shown that in the employment of military force for the suppression of the insurrection the acts which resulted in damages were unavoidable, necessary, and justifiable, and according to the rules of civilized warfare, and even then Spain would be bound to make just reparation for the actual damage sustained by an American citizen.

RECONCENTRATION ORDERS.

It is impossible to consider the reconcentration orders and their consequences separate from the treaty of 1795. It is not a question, in this connection, whether reconcentration was or was not a legitimate war measure in the abstract, but whether the reconcentration policy as carried out in Cuba during the insurrection was contrary to the provisions of the treaty of 1795. There is no room for doubt as to what the object of the Government of the United States was, for the clearly expressed intention was to provide absolute protection to American citizens and their property. The words "for any military expedition or other public or private purpose whatsoever" were incorporated in the treaty for no other reason than to effectually prevent either of the parties to the contract "from seeking to justify an embargo, expropriation, or spoliation by reason of the purpose to which the seized property was to be devoted. In other words, the obvious design of this Government was not to prevent Spain from acquiring property for any of the purposes named, but to prevent the possibility of American citizens being deprived of their property on any pretext whatever." If this be the correct interpretation of the meaning of the treaty, it is not necessary here to discuss the question as to whether the damages suffered by citizens of the United States

were done by Spanish authorities or insurgents, for Spain would be responsible for whatever damages, no matter by whom committed, that were the natural result of her violation of the treaty.

If during the reconcentration a citizen of the United States was deprived of the enjoyment of his property or the power to protect it from damages resulting from the wanton act of Spain's authorities, this would make Spain liable under the rules of international law as well as under the treaty. If the destruction was caused by Spanish authorities under these conditions in order to prevent the insurgents from using the property or for the purpose of furnishing the Spanish authorities with supplies, such acts would be in violation of the treaty. If the injuries were done as a punishment for crime, the only justification then for Spain would be that the judgment of some judicial tribunal, after a fair trial, had authorized such an act.

It is not contended that the removal of noncombatant people temporarily to places of safety beyond the sphere of actual warfare is necessarily an illegitimate war measure. The government, however, that adopts reconcentration as a war measure must be presumed to have foreseen all its consequences, and undoubtedly assumes responsibilities and incurs liabilities which the nature of the reconcentration, its execution, and results must determine. But the whole subject of reconcentration during the Cuban insurrection and what results therefrom or from other military orders made Spain liable for damages is purely an abstraction, as far as this forum is concerned. Whether the reconcentration in Cuba was civilized warfare is not now an open question for this tribunal. President McKinley, in his message of April 11, 1898, after recounting the horrible and intolerable conditions which resulted from reconcentration, says: "Reconcentration, adopted avowedly as a war measure in order to cut off the resources of the insurgents, worked its predestined result. * * * It was not civilized warfare, it was extermination." (Mess. Presidents, Vol. X, p. 140.) It is deemed unnecessary to make other quotations, but see letter Secretary of State to Spanish minister, June 26, 1897, Foreign Relations, 1897, page 507; President's Message, December 6, 1897; Messages Presidents, Volume X, page 128; Report of Attorney-General, March 15, 1902; Report of Senate Committee on Foreign Affairs, April 13, 1898, No. 885, Fifty-fifth Congress, second session.

The political department of this Government having decided that the reconcentration which Spain undertook to justify as a necessary measure of war was not civilized warfare, this Commission is bound to so hold; and applying the particular stipulations of the treaty of 1795, now under consideration, to the consequences of such uncivilized warfare, Spain should be held liable for the injuries and destruction of the property of American citizens in the depopulated and devastated regions resulting from the reconcentration policy.

Just as a nation, when it intervenes in the internal affairs of another, is heavily burdened with the proof that it vindicates a right, in the same sense is a nation, when it refuses belligerent rights to rebels and adopts measures to suppress an insurrection, heavily burdened with the proof that the destruction of the neutral's property as a war measure was necessary.

The United States occupies a unique position in the family of nations and does not admit the principle that the whole body of international law applies here as it does to the governments of Europe. For illustration: A single power in Europe will not intervene in the internal affairs of another without suggesting before doing so the joint action of several others, and no instance is recalled, in modern history at least, where a single European power has singly intervened. There is, on the contrary, no concert of powers in America, because the United States occupies a position of towering influence in this hemisphere which entitles it, according to our theory, to independent single action. There are no "spheres of influence" on this continent, and in the determination of questions of international law, so far as they relate to American countries at least, the United States need not invite any other government to the council board. This Government asserts the right to say that the most powerful European Government must arbitrate a boundary dispute with a weak South American Republic, and the principle is acquiesced in, but no power or concert of powers in Europe would tell this Government that it must adopt a certain method for the settlement of a dispute with one of the Republics to the South. For the adjustment of differences on this side of the water there is "an international law of the New World."

Until the United States declared war against Spain (this had to be done before intervention in Cuba) it was an open question whether the right existed, and was a subject of international discussion; but when the declaration was made the incident was thereupon closed, and that act itself decided the existence of the cause for intervention and became its own justification. No other power or concert of powers since then has disputed the exercise of this right by the United States under the principles of international law. The action of this Government determined international law on that subject, and all the other powers that may have questioned the right acquiesced when the declaration was actually made. Certainly no court of the United States would for a moment hold that the declaration of war was not justified by the principles of international law, because intervention in the internal affairs of another nation could not occur without concert or on any other ground. It is doubtful whether such a tribunal should even permit the suggestion that the action was unjustifiable.

This being a correct statement of the principle of intervention by the United States in the internal affairs of a nation having territory

on this continent, binding even upon foreign governments, it follows, of course, that the people and the courts of the United States were committed and must accept as final and binding upon them the *facts* which the Government decided were sufficient grounds for intervention at the time the declaration of war was made. In other words, as the declaration of war against Spain was a decision by this Government that it had the right to make it, and the act itself determined its own justification, the courts of the country are bound to accept its legality, and they are similarly bound to accept as established the *facts* which the Government declared to be true when it made them the basis of its declaration of war. Therefore, when the Government of the United States, with the facts in its possession, declared to the world that Spain was employing methods of warfare in Cuba which were not permissible, because contrary to the rules and usages of international or civilized warfare, the courts of the United States were thereby and for all time concluded both as to the facts and the declaration based on them.

As has been forcibly said, "a government would be impossible if its courts had the right to decide contrary to the conclusions of the government on questions of fact which it had made the basis of international action." Courts are bound to assume that the facts upon which their governments predicated a demand not only existed, but that they were true or not as the government put upon them its seal of approval or disapproval. The Supreme Court has invariably held from its organization to the present time that courts of the United States "must take judicial knowledge of and are bound by the acts of the executive department of the Government on all subjects connected with foreign or international affairs," and in the case of *Jones v. United States*, 137 U. S., 221, Mr. Justice Gray, delivering the opinion of the court, said: "It is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong." See also *Gelston v. Hoyt* (3 Wheat., 246, 324); *U. S. v. Palmee* (3 Wheat., 610); *The Divine Pastora* (4 Wheat., 52); *Foster v. Neilson* (2 Pet., 233, 307, 309); *Keane v. McDonough* (8 Pet., 308); *Garcia v. Lee* (12 Pet., 511, 520); *United States v. Yorva* (1 Wall., 412, 423); *United States v. Lynde* (11 Wall., 632, 638); *Williams v. Suffolk Ins. Co.* (38 U. S., 419); *U. S. v. Reynes* (9 Howard, 127); *Kennett v. Chambers* (14 Howard, 28); *Hoyt v. Russell* (117 U. S., 401); *Coffee v. Grover* (123 U. S., 1); *The Three Friends* (166 U. S., 1).

The measure of our liberality toward our citizens should not be one whit less than the demands which are made on their behalf against a foreign nation. If a claim is on its face of the class which our Government presented to Spain, the claimant should not in this tribunal be denied the privilege of developing the merits of his claim, and having the same, as thus developed, adjudicated according to the principles of equity and of international law.

It may be that none of them is properly allowable for the whole amount claimed and that in many of them the *ad damnum* is greatly exaggerated, but it should not be forgotten that a claimant is remediless if denied a hearing here, and this tribunal of final resort should therefore be as liberal as the most generous construction of the treaty and statute allow in permitting every claimant whose petition is undemurrable as to jurisdictional facts and forms the fullest opportunity of developing his claim by evidence.

An international war is a war between separate independent nations. There can not be international warfare between a government and a part of its citizens, nor between a king and a portion of his subjects. When an insurrection becomes an international war the insurrectionists lose their *subject* character, and afterwards become a people as well as a law unto themselves. Spain never acknowledged that the *subject* character of the insurrectionists in Cuba was changed, on the contrary asserted until the intervention by the United States that all the territory was hers and that the people in rebellion were her subjects, and the Government of the United States not only acquiesced in this principle but treated with the sovereignty of Spain, even after successful intervention, upon that theory. This Government never recognized the rebels in any sense as separate from Spanish dominion, and continued throughout the insurrection to refuse them rights of belligerency. Even if contrary action had been taken by this Government the insurrection would not *ipso facto* have been changed into international war, but the effect would have been to release Spain from liability for injuries done to citizens of the United States and their property by the subjects of Spain at war with her; and this was one of the principal grounds why the Government of the United States refused to grant belligerent rights to the insurgents. President McKinley, in his message of December 6, 1897, said recognition of the rebels "would give rise to countless vexatious questions; would release the parent government from responsibility for acts done by the insurgents, etc." (For. Rel. 1897, p. xvii.) This has always been the attitude of our Government, and the President was but following the course adopted by his distinguished predecessors. As far back as 1861 this Government, after strenuously opposing recognition by Great Britain of the Southern Confederacy, asserted that recognition relieved the United States from all liability for injuries done British subjects by the authorities of the Confederate government.

Charles Francis Adams, Minister to England, in reporting to the Secretary of State, June 14, 1861, the action of the British Government, said: "At any rate there was one compensation, the act (recognition) had released the Government of the United States from responsibility for any misdeeds of the rebels toward Great Britain. If any of their people should capture or maltreat a British vessel on

the ocean, the reclamation must be made only upon those who had authorized the wrong; the United States would not be liable." (For. Rel. 1861, p. 105.)

President Grant, in his message of 1875, said: "Such recognition (of belligerent rights to insurgents in Cuba) * * * releases the parent government from responsibility for acts done by the insurgents." (Mess. Presidents, Vol. VII, p. 339.)

It will thus be seen that while "countless vexatious questions" would arise out of recognition, this Government refused to grant it to the insurgents in the last insurrection upon the same ground, among others, that controlled the Government in 1875, namely, that by doing so "Spain would be released from responsibility for acts done by the insurgents." No question of "ability to control," or "beyond control," but broadly and exactly one of preserving the right of this Government to hold Spain responsible for damages done our citizens by the insurgents so long as we refused to give them recognition.

And now it is contended that the Government of the United States must descend from this proud attitude of guardian and defender of the rights of its citizens who have suffered intolerable wrongs to their persons and devastation of their estates in Cuba, where "anarchy, lawlessness, and terrorism were rampant," and tell its suffering people that their Government has been mistaken, that it was never justified in asserting such a principle, and that, having released Spain from the demands, upon agreement to adjudicate and settle them itself for a valuable consideration, all liability is denied, and that in any event before one penny is paid them they must prove that the insurgents were *not* beyond control and that it was *not* impossible for Spain by due diligence to have prevented the damage; and in case the damage was done by Spanish authorities that it was *not* necessary and was *not* according to the rules of civilized warfare.

The following declarations of our Government, taken here and there from the pages of its diplomatic history, and which have been of influence in the preparation of this opinion, will be filed herewith without reading them at this time, as follows:

THE ATTITUDE OF THE UNITED STATES GOVERNMENT FOR A CENTURY.

Mr. Adams, Secretary of State, to Mr. De Onis, March 12, 1818, 2d Wharton (2d ed.), p. 490:

There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by all the efforts in his power.

Mr. McLane, Secretary of State, to Mr. Butler, June 20, 1834, 2d Wharton (2d ed.), p. 576:

The mere "revolutionary state" of a part of Mexico can not be accepted by the United States as a defense to a claim on Mexico for injuries inflicted on citizens of the United States in Mexico in violation of treaty engagements.

Secretary Fish to Mr. Foster, August 15, 1873, 2 Wharton (2d ed.), p. 579:

If a country receives strangers within its limits it thereby incurs a liability to protect them from violence, not only on the part of its own authorities but ordinarily also from violence on the part of insurgents. This latter ground of liability may be regarded as continuing at least until the government of a neutral country whose citizens may be aggrieved in the course of the hostilities shall recognize the insurgents as entitled to belligerent rights. (Supra, 69.)

There was no such recognition by this Government at the time when the claimants adverted to sustained the injuries of which they complain. This, however, though the general rule, is subject to obvious exceptions. Perhaps the rule should not always apply to persons domiciled in a country, and rarely to such as may visit a region notoriously in a state of civil war, or ever to such part of a country as may virtually be domiciled by savage tribes.

The treaty of 1831 between the United States and Mexico does not by itself relieve Mexico from liability for injury inflicted by insurgents in Mexico on citizens of the United States.

See also Secretary Fish to Mr. Foster, December 16, 1873, 2 Wharton (2d ed.), p. 580, to show the difference between the position taken by the United States against Mexico and the position assumed by our Government in regard to claims of foreigners for injuries by the insurgents during our civil war:

The resort to such measures as were adopted by the forces of the Haytian Government to suppress the local revolt against the Government and the laws may have been, and no doubt was, in the estimation of the Haytian Government, entirely justifiable, and this Government has no disposition to question the correctness of this view as to these precautionary municipal measures; but it follows, nevertheless, that the Government is answerable for the destruction of private property which may have been necessarily sacrificed to the success of such measures. It is because of the recognition by this Government of the necessities that such emergencies give rise to that it limits the demand in the present instance to compensation for actual losses.

Secretary Evarts to Mr. Gibbs, May 28, 1878, 2 Wharton (2d ed.), p. 602:

A government is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed.

Secretary Blaine, July 1, 1881, adopted this very language of Secretary Fish in his instructions to Minister Langston. (See 2 Wharton, 2d ed., p. 580.)

Secretary Frelinghuysen to Mr. Baker, April 18, 1884, 2 Wharton (2d ed.), p. 581:

A government is liable internationally for injury inflicted on aliens through its negligence in permitting insurgents to destroy the property of such aliens and by its subsequent implied ratification of the conduct of such insurgents, there being no redress offered in the courts of such government.

Secretary Bayard to Mr. Scruggs, May 19, 1885, 2 Wharton (2d ed.), p. 668:

The government of a foreign State is liable not only for any injury done by it, or with its permission, to citizens of the United States or their property, but for any such injury which by the exercise of reasonable care it could have averted.

Secretary Bayard to Mr. Bragg, March 15, 1888 (For. Rel., 1888, p. 1149):

Relying instead, as they had the right, upon the invitation and friendly disposition of the Mexican Government, and upon its ability to give protection to those who thus induced to come under its laws and who obeyed them, three blameless and worthy American citizens have been betrayed to their death. * * * All these conditions concur to indicate an indifference amounting almost to an acquiescence in continued wrongdoing, which would constitute a condition of affairs for which responsibility may justly be said to rest with the Government of Mexico.

Secretary Sherman to Dupuy de Lome, July 6, 1897 (For. Rel., 1897, p. 516):

To be able to protect and yet to refuse protection upon a self-formulated pretext can not, in the view of this Government, exempt that of Spain from its just liabilities in the premises should injury to American rights result from the removal of protection. The consul-general will, consequently, be instructed to remonstrate against the withdrawal of military protection from the "Victoria" estate, upon the grounds advanced in the letter of the Marquis de Ahumada to General Lee, reserving all rights in the matter.

Acting Secretary Adey to Dupuy de Lome, July 29, 1897 (For. Rel., 1897, p. 519):

Inasmuch as the terms of General Weyler's bando, under which the protection is withdrawn, require that the estate if left without a garrison shall be abandoned by all persons residing or being thereon, the effect of this determination of the authorities is not only to deprive the property of citizens of the United States of the protection due to them, but it amounts to the condemnation of this valuable property to abandonment, dilapidation, and possible destruction, against which this Government is constrained to remonstrate, not merely in the present case but in all others where the same state of facts may be ascertained to exist.

Secretary Sherman to Dupuy de Lome, August 11, 1897 (For. Rel., 1897, p. 520):

It appears, therefore, from this complaint that it is not a question of expropriation for organized military operations, for which the treaty of 1795 provides, but of wanton depredation and pillage of private property by the soldiery, in violation not only of the treaty rights of an American citizen but of the ordinary rules of war. This seems to call for a searching inquiry on the part of your Government, punishment of the offenders if discovered, stringent orders to prevent the recurrence of such acts of spoliation, and full compensation to the injured party.

Secretary Olney to Dupuy de Lome, March 13, 1896 (For. Rel., 1896, pp. 672, 673):

By the code of every civilized nation, marauding and robbery of this class entail upon the perpetrators the severest penalties known to military law. The circumstances narrated seem therefore to call for the most searching inquiry and rigorous

punishment of the offenders, with reparation to the injured party, as well as stringent orders to prevent the recurrence of such acts of theft and spoliation.

Secretary Olney to Dupuy de Lome, April 4, 1896 (For. Rel., 1897, pp. 540, 543):

The consequence of this state of things (having set out at some length the conditions to which American citizens were subjected during the insurrection, and shortly previous to the date of the letter) can not be disguised. Outside of the towns still under Spanish rule, anarchy, lawlessness, and terrorism are rampant.



